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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CHURCH OF SCIENTOLOGY INTERNATIONAL; BOWLES & MOXON; AND CHURCH OF SCIENTOLOGY OF ILLINOIS,

Petitioners,

v.

CULT AWARENESS NETWORK,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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PETITION FOR A WRIT OF CERTIORARI

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December 16, 1997

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QUESTION PRESENTED

Whether Illinois may define its special injury requirement for the tort of malicious prosecution to include the coordination and encouragement of a series of lawsuits challenging discriminatory practices when relevant decisions of the Court have held that the activities of an organization and its attorneys in encouraging and coordinating individuals to bring a series of antidiscrimination cases are protected activities under the First Amendment to the Constitution of the United States?

RULE 29.6 STATEMENT

Petitioners Church of Scientology International, Bowles & Moxon, and Church of Scientology of Illinois have no parent companies or subsidiaries to list pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioners Church of Scientology International, Bowles & Moxon, and Church of Scientology of Illinois respectfully petition for a writ of certiorari to review the opinion of the Supreme Court of Illinois in this case, which directly conflicts with decisions of the Court and abridges the First Amendment rights of petitioners.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois that petitioners seek to be reviewed (1a-18a),[1/] which reversed the judgments of the appellate and circuit courts in this case, is reported at 177 Ill.2d 267, 685 N.E.2d 1347, 226 Ill. Dec. 604 (1997). The opinion of the appellate court of Illinois affirming the dismissal of this action (19a-34a) is reported at 279 Ill. App. 3d 66, 664 N.E.2d 217, 215 Ill. Dec. 820 (1st Dist. 1996). The orders of the circuit court of Illinois dismissing the complaint of respondent Cult Awareness Network ("CAN") (35a, 36a-42a) are unreported.

JURISDICTION

The opinion of the Supreme Court of Illinois was entered on September 18, 1997. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

[1/] References to "(__a)" are to the pages in the appendix to this petition.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Statement of Facts

Petitioners Church of Scientology International ("CSI" or "the Church") and Church of Scientology of Illinois are religious organizations that have been recognized by the Internal Revenue Service as churches under 26 U.S.C. § 170, entitled to tax-exempt status under 26 U.S.C. § 501(c)(3). *See* Internal Revenue Service, *Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1986*, Publication 78 (rev. 11-96). CSI is the "mother church" of the Scientology religion, which numerous courts have recognized as a bona fide religion entitled to protection under

the First Amendment to the Constitution of the United States.[2/] Petitioner Bowles & Moxon is a law firm. (R. C212-C213.)[3/]

Respondent CAN is a not-for-profit educational organization that enjoys the benefits of federal tax exemption under 26 U.S.C. § 501(c)(3). (R. C212.) CAN has used its status as a tax-exempt organization to conduct a lengthy, bitter and one-sided nationwide campaign against certain religious and other voluntary membership organizations that it has subjectively identified as "cults." One of CAN's main targets has been the Scientology religion. In an effort to bring balance and fairness to CAN's so-called "educational" efforts, a number of Scientology parishioners, encouraged by their church, attempted to join CAN or CAN local affiliates or to attend CAN conferences, which were held at public accommodations. CAN refused to allow them to do so.

[2/] *Founding Church of Scientology* v. *United States*, 409 F.2d 1146, 1160 (D.C. Cir.), *cert denied*, 396 U.S. 963 (1969); *Church of Scientology* v. *C.I.R.*, 823 F.2d 1310, 1313 (9th Cir. 1987) ("Scientology is an international religion with numerous churches around the world"), *cert. denied*, 486 U.S. 1015 (1988); *Church of Scientology Flag Service Org., Inc.* v. *City of Clearwater*, 2 F.3d 1514, 1519-20 (11th Cir. 1993), *cert. denied*, 513 U.S. 807 (1994); *Christofferson* v. *Church of Scientology*, 57 Or. App. 203, 644 P.2d 577, 601 (1982), *cert. denied*, 459 U.S. 1206 (1983). *See Hernandez* v. *C.I.R.*, 490 U.S. 680, 684-85 (1989) (describing Scientology religious beliefs).

[3/] References to "R. ___" are to the pages of the clerk's record in the proceedings on appeal to the appellate court of Illinois.

In response, and again with the encouragement and assistance of their church, a number of Scientologists throughout the country brought separate antidiscrimination lawsuits against CAN or CAN local affiliates, based on applicable state and federal statutes, challenging CAN's refusal to permit them to become members, to affiliate with CAN, or to attend public CAN functions because of their religion. (R. C213-C227.) Some of these lawsuits were filed in federal district courts, alleging federal claims; others were filed in state courts, including New York, California, and Illinois, alleging state law claims. The lawsuits alleged that CAN and its affiliated organizations had an obligation as tax-exempt *educational* organizations to be open to and consider different points of view on questions on which CAN was involved, and that CAN therefore violated federal or state civil rights laws by refusing to permit individual Scientologists to join or affiliate with CAN or attend CAN meetings. (*Id.*)

A number of courts dismissed the individual actions on legal grounds, declining to adopt the plaintiffs' argument that CAN's status as a not-for-profit, public educational tax-exempt organization subjected it to coverage under applicable state or federal antidiscrimination statutes. (R. C215-217; C218-C227.)[4/] Several were dismissed as moot (or premature) when CAN, in response to the lawsuits, changed its national membership policy and permitted Scientologists to join. *See,*

[4/] At the time the suits were filed a similar issue arising under California's Unruh Act was pending in the California courts involving the Boy Scouts, which is as yet unresolved. *See Curran* v. *Mount Diablo Council of the Boy Scouts of America*, 29 Cal. Rptr. 2d 580 (Cal. Ct. App. 2d Dist. 1994), *review granted and pending*, 874 P.2d 901, 31 Cal. Rptr. 2d 126 (Cal. 1994).

e.g., the *Bagley* case (R. C215.) Other cases were voluntarily dismissed by the plaintiffs (R. C227, C247, n.2, C256, n.4), presumably in response either to the change in CAN's policy or to the lack of success on the legal issue in other courts. CAN then instituted this action.

Proceedings Below

CAN filed its first complaint against petitioners and a number of other defendants on January 21, 1994 in the circuit court of Illinois. (R. C3-C37.) It withdrew that complaint in response to defendants' motion to dismiss (R. C63), and on June 8, 1994, it filed a four-count first amended complaint, alleging conspiracy to engage in malicious prosecution, conspiracy to interfere with right of association and assembly, infringement of right of association and assembly, and maintenance. (R. C73-C106.) Defendants moved to dismiss the amended complaint for failure to state a cause of action (R. C116-C119), arguing, among other grounds, that CAN failed to satisfy Illinois' stringent requirements to bring a malicious prosecution action and that their actions were protected activities under the First Amendment and thus could not serve as the basis for a state law tort claim. (R. C134.) On September 26, 1994, the circuit court (Gillis, J.) dismissed CAN's claims of conspiracy to interfere with right of association and assembly, infringement of right of association and assembly, and maintenance, without leave to replead. (40a-41a.) The court agreed with defendants that the First Amendment protects an organization's provision of assistance and support to its members in bringing antidiscrimination claims and that such actions cannot be made an element of a state law tort action. (41a.) The court also dismissed, with leave to replead, CAN's claim of conspiracy to engage in malicious prosecution. The court found that CAN's complaint failed to meet either Illinois'

favorable termination or special damages requirements necessary to state a cause of action for malicious prosecution. (38a-40a.) In particular, the court warned that "defendants are correct that Malicious Prosecution requires a detailed pleading of Special Damages," which clearly was lacking in the first amended complaint. (40a.)

CAN filed a second amended complaint on October 24, 1994 against petitioners (R. C211-C231), alleging a single count of conspiracy. (R. C227-C230.) The complaint alleges that petitioners conspired with each other and others to engage in malicious prosecution to bring twenty-one underlying lawsuits. (R. C212, C227-C229.) It also alleges that the lawsuits were unfounded and that they were filed for malicious and improper purposes, including to impede and prevent CAN from performing its public education functions, and to bankrupt CAN by forcing it to defend against these suits. (R. C213, C229.) [5/]

[5/] CAN did file a petition for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Northern District of Illinois, *see In re Cult Awareness Network, Inc.*, No. 95 B 22133 (N.D. Ill. 1995), which it recently voluntarily converted to a Chapter 7 petition for liquidation. The bankruptcy, however, was not a result of the underlying litigation at issue here. Rather, CAN was forced into bankruptcy because a judgment of $875,000 in compensatory damages and $1,000,000 in punitive damages was recently rendered against it in the United States District Court for the Western District of Washington for instituting the kidnapping and forcible deprogramming of a member of a Christian fundamentalist church in violation of 42 U.S.C. §§ 1985 and 1986. *Scott* v. *Ross*, No. C94-0079C (W.D. Wash., filed Nov. 29, 1995).

In denying CAN's motion for a new trial or remittitur, the district court found "that the evidence sufficiently supports

Petitioners again moved to dismiss CAN's complaint, contending that CAN's complaint still failed to satisfy either Illinois' special damages or favorable termination elements. (R. C240-C259.) Petitioners also again argued that even if they coordinated the underlying cases and provided counsel and assistance to the plaintiffs in challenging a pattern and practice of discrimination, these activities did and could not constitute tortious or unlawful conduct. Petitioners maintained that under the decisions of the Court,[6/] their actions were strictly protected

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the jury's determination that CAN knowingly participated in the decision to abduct Mr. Scott and deprive him of the right to interstate travel. Moreover, the evidence conclusively established that the decision was motivated by a discriminatory animus toward his religious affiliation." *Scott* v. *Ross*, No. C94-0079C, slip op. at 5. The court further concluded "that the reprehensibility of CAN's conduct goes far to justify the amount of the award." *Id.* at 8. Finally, in terms of considerable relevance here, the court criticized CAN's "seeming incapability of appreciating the maliciousness of [its] conduct towards Mr. Scott. Rather, throughout the entire course of this litigation [it has] attempted to portray [itself] as [a] victim of Mr. Scott's counsel's alleged agenda." *Id.* at 14 . (Mr. Scott's counsel was Kendrick Moxon, of Bowles & Moxon, one of the defendants herein.) The court found that CAN's failure to accept responsibility for its unconstitutional acts and its attempt to blame them on Mr. Moxon's "alleged" agenda warranted a large punitive damage award to deter future tortious acts. *Id.*

6/ *NAACP* v. *Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers* v. *Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *United Transp. Union* v. *State Bar of Michigan*, 401

by the First Amendment and thus could not constitute special damages under Illinois tort law. (R. C247, C305-C306; R. 17-18.)

On May 10, 1995, after argument on petitioners' motion to dismiss, the circuit court (Nowicki, J.)[7/] dismissed the complaint with prejudice on two independent grounds. (R. C355.) First, the court held that CAN had failed to meet Illinois' special injury requirement, rejecting CAN's argument that it had satisfied this requirement by alleging that it was required to defend twenty-one lawsuits brought by twenty-one individuals based upon separate acts of discrimination. (R. 18-19, 27-28.)[8/] The court did not reach petitioners' First Amendment argument because it held that under Illinois law, special injury from multiple litigation exists only where the same plaintiff brings repeated litigation against the same defendant based upon the same acts or cause of action, "which has been finally and conclusively concluded." (R. 19.) Second, the court held that CAN once again had failed to satisfy Illinois' favorable termination requirement, which it understood as requiring an adjudication of facts in the underlying cases. (R. 20-21, 29.) The court offered CAN a fourth opportunity to allege the requisite special damages and to meet Illinois' favorable termination requirement. CAN declined, presumably because it could not so allege in good faith. (R. 23, 30.)

U.S. 576 (1971); *In re Primus*, 436 U.S. 412 (1978).

7/ Judge Gillis had been reassigned to a different part of the court.

8/ As we have noted, many of the twenty-one lawsuits were not brought against CAN, but rather against local CAN affiliates or allied organizations in various localities. (*See, e.g.*, R. C215, C221, C222-C223, C225, C226.)

CAN appealed the circuit court's dismissals of its complaints. In opposing CAN's appeal, petitioners again argued, among other grounds, that even if they coordinated the cases underlying CAN's conspiracy claim and provided counsel and assistance to challenge a pattern and practice of discrimination, such actions were an exercise of their First Amendment rights and thus could not constitute special damages under Illinois malicious prosecution law. (Brief of Defendants-Appellees in the Appellate Court of Illinois, First District at 2, 59-60.) They also maintained that to hold otherwise the court would be required to overrule decisions of the Court.

On March 26, 1996, the Illinois appellate court affirmed the circuit court's orders dismissing CAN's complaint, finding that CAN's allegations failed to satisfy either Illinois' special damages or favorable termination requirements. (19a-34a.) The appellate court held that to state a claim for malicious prosecution based on multiple litigation under Illinois law, the underlying actions must be based on "the same cause of action arising from the same facts" and be "brought by the same plaintiff against the same defendants. . . *after* the [plaintiff] had his day in court and after 'the final and conclusive determination of his rights by this court.'" (30a.) Because the appellate court, like the circuit court, found that the complaint's allegations did not meet these requirements and instead "constitute[d] the ordinary harm generated from any legal actions" (29a), it also did not reach petitioners' First Amendment argument.

CAN appealed to the Supreme Court of Illinois, and on September 18, 1997, the court reversed the judgments of the appellate and circuit courts on two grounds. First, the court relaxed Illinois' favorable termination requirement in malicious prosecution cases, holding that terminations that do not reach the merits of the underlying case may satisfy Illinois' favorable termination requirement in certain circumstances. (10a-12a.)

Second, the court expanded Illinois' definition of special damages. The court held that Illinois' special injury requirement for malicious prosecution cases could be met where a defendant has coordinated and encouraged a series of lawsuits challenging discriminatory practices. (16a-18a.) The court specifically rejected petitioners' argument (*see* Brief of Defendants-Appellees in the Supreme Court of Illinois at 19-21) that such a conclusion would infringe upon their exercise of First Amendment rights and would directly conflict with decisions of the Court holding that litigation activities of a national membership organization, including encouraging, financing, and coordinating a series of lawsuits challenging discriminatory practices, are protected by the First Amendment. (17a-18a.)

REASONS FOR GRANTING THE WRIT

I. THE OPINION OF THE SUPREME COURT OF ILLINOIS DIRECTLY CONFLICTS WITH DECISIONS OF THE COURT BY DEFINING ILLINOIS' SPECIAL DAMAGES REQUIREMENT FOR MALICIOUS PROSECUTION TO INCLUDE PROTECTED FIRST AMENDMENT ACTIVITY

For more than a century, Illinois has consistently reiterated and adhered to the policy that malicious prosecution actions are highly disfavored in law. *See, e.g., Gorton* v. *Brown*, 27 Ill. 489, 494 (1862); *Shedd* v. *Patterson*, 302 Ill. 355, 359 (1922); *Schwartz* v. *Schwartz*, 366 Ill. 247, 250 (1937); *see also Levin* v. *King*, 271 Ill. App. 3d 728, 730 (1st Dist.), *appeal denied*, 163 Ill. 2d 560 (1995); *Berlin* v. *Nathan*, 64 Ill. App. 3d 940, 945 (1st Dist. 1978), *cert. denied*, 444 U.S. 828 (1979). The Supreme Court of Illinois has explained the reasons for the strong disapproval of the tort: "[C]ourts should

be open to litigants for the settlement of their rights without fear of prosecution for calling upon the courts to determine such rights." *Schwartz,* 366 Ill. at 250. Thus, "even those with evil aims in bringing suit without probable cause are given 'one bite' to do so." *Levin,* 271 Ill. App. 3d at 732 (citation omitted).

To further its policy and to preserve citizens' free and unfettered access to the courts, Illinois has long required that to maintain an action for malicious prosecution a plaintiff must allege special injury or special damages, in addition to showing lack of probable cause and malice, and it strictly construes this requirement.[2/] Illinois first set forth its special damages rule in *Smith* v. *Michigan Buggy Co.*, 175 Ill. 619 (1898), and it has continued to be applied in an unbroken line of cases for the last century.

The purpose of Illinois' policy disfavoring malicious prosecution actions and its special damages requirement is not to reward those with evil aims and no probable cause; rather, it recognizes that the identification of such people is often a difficult and subjective judgment and that the danger of incorrect or inaccurate identification could chill or punish the exercise of protected rights by persons acting without evil aims. As the court in *Berlin* explained:

> The purpose of the special injury rule . . . is to strike a balance between allowing free access to

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[2/] To prevail on a claim for malicious prosecution in Illinois, a plaintiff must show that the defendant brought the underlying suit maliciously and without probable cause; that the former action was terminated in his or her favor; and that he or she sustained special injury or special damage beyond the usual expense, time, or annoyance in defending a lawsuit. *Bank of Lyons* v. *Schultz*, 78 Ill. 2d 235, 239 (1980); *Schwartz*, 366 Ill. at 250-53.

> the courts for the vindication of rights without fear of a resulting suit, and the undue exercise of such right. . . . In order to maintain a free access to the courts by persons with grievances who might otherwise be restrained from seeking redress because of their fear of liability should they fail, the special injury rule has consistently been upheld.
>
> The limitation is sound. When disputes reach the litigious stage, usually some malice is present on both sides. Friendly tort suits are not common. Nor is existence or want of probable cause always easy to determine until the event of the litigation is known. Some margin of safety in asserting rights, though they [may] turn out to be groundless and their assertion accompanied by some degree of ill-will, must be maintained. Otherwise litigation would lead, not to an end of disputing, but to its beginning, and rights violated would go unredressed for fear of the danger of asserting them.

Berlin, 64 Ill. App. 3d at 946-47 (internal quotations and citations omitted).

Thus, in Illinois, even where a civil suit is commenced with malice and "without probable cause," *Smith*, 175 Ill. at 627, there must be a showing of special damages to sustain a claim for malicious prosecution. By imposing such a requirement, Illinois is able to cabin the dangers of unpredictability of jury determinations on the subjective elements of probable cause and malice that the tort of malicious prosecution presents.

To meet Illinois' stringent special damages requirement, a plaintiff generally is required to allege and prove a significant and direct interference with a property or personal liberty

interest, such as arrest under civil process, involuntary confinement, attachment of property, garnishment, or proceedings in bankruptcy. *Schwartz*, 366 Ill. at 250; *Smith*, 175 Ill. at 627. Multiple litigation may also constitute special damages under Illinois law where the same party brings successive suits against the same opponent after "after a party has had his day in court and his right has been conclusively determined." *Shedd*, 302 Ill. at 360; *see also Levin*, 271 Ill. App. 3d at 732. In this case, however, the Supreme Court of Illinois expanded the definition of special damages to include instances where a defendant has encouraged and coordinated a series of lawsuits to be brought to challenge discriminatory practices. (16a-18a.) This Illinois cannot do.

In a long line of cases, the Court has explicitly held that the litigation activities of a national membership organization, including encouraging, financing, coordinating, and even providing counsel for a series of lawsuits challenging discriminatory practices, are protected activities under the First Amendment. *NAACP* v. *Button*, 371 U.S. 415, 438-445 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia State Bar*, 377 U.S. 1, 2-8 (1964); *United Mine Workers* v. *Illinois State Bar Ass'n*, 389 U.S. 217, 222-225 (1967); *United Transp. Union* v. *State Bar of Michigan*, 401 U.S. 576, 580-586 (1971); and *In re Primus*, 436 U.S. 412, 422-432 (1978). The Court has consistently so held to avoid placing such organizations at the mercy of potentially hostile juries and to prevent the chilling of protected freedoms of expression and association. *Cf. New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). As the Court explained in *United Transp. Union*:

> At issue is the basic right to group legal action, a right first asserted in this Court by an association of Negroes seeking the protection of freedoms guaranteed by the Constitution. The common thread running through our decisions in *NAACP* v. *Button*, *Trainmen*, and *United*

> *Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation.

401 U.S. at 585-86. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958), and the "efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." *In re Primus*, 436 U.S. at 431. The First Amendment thus requires "a measure of protection for 'advocating lawful mean of vindicating legal rights,' including 'advis[ing] another that his legal rights have been infringed and refer[ring] him to a particular attorney or group of attorneys . . . for assistance.'" *Id.* at 432 (*quoting Button*, 371 U.S. at 437, 434). Illinois' new and expanded definition of special damages directly conflicts with these principles and abridges petitioners' First Amendment rights.

If Illinois did not have a special damages requirement, there would be no First Amendment issue here. The only First Amendment protections afforded a malicious prosecution defendant would be those provided by the Court in *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993). However, because of the dangers of the unpredictability of jury determinations regarding lack of probable cause and malice,[10/] Illinois has required that

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[10/] The danger is particularly acute where the actions of political, civil rights, or religious minorities are at issue, such

a plaintiff prove special damages in addition to lack of probable cause and malice. But it has now defined special damages to include the coordination and encouragement of litigation to challenge discriminatory practices, activity protected under the *Button* line of cases. The distinction between tortious and non-tortious conduct under Illinois malicious prosecution law thus can now turn on whether a defendant has engaged in protected speech and associational conduct. Illinois has singled out protected speech and associational conduct as the defining characteristic of tortious activity under Illinois malicious prosecution law.

Such a rule not only unduly burdens and abridges the exercise of protected speech and association, it punishes it. For example, if an individual filed a single antidiscrimination suit that a jury found lacked probable cause and was brought with malice, the individual could not be held liable under Illinois law for malicious prosecution absent proof that the lawsuit significantly and directly interfered with a property or personal liberty interest of the plaintiff. However, if an organization, whether it be the ACLU, the NAACP, the NRA, or the National Family Legal Foundation, encouraged or coordinated a series of individual test cases in various jurisdictions to challenge discriminatory practices and a jury found that these suits were brought without probable cause and with malice, it could be held liable for malicious prosecution in Illinois merely for having exercised its *Button* rights. The very fact of having engaged in protected First Amendment activity is what would turn the organization's activity into tortious and actionable conduct under Illinois law.

Illinois' definition of the special damages element of the tort of malicious prosecution to include the coordination and supporting of litigation to challenge discriminatory practices

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as in *NAACP* v. *Alabama*, and such as here.

thus directly conflicts with the decisions and precedent of the Court, which have strictly protected such activity under the First Amendment, and abridges petitioners' constitutional rights. Where, as here, a state has built in a special protection for defendants in malicious prosecution suits by requiring proof of special damages, it cannot, as Illinois has done, define this element of the tort to include protected First Amendment activity.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Illinois should be granted.

Dated: New York, New York
December 16, 1997

Respectfully submitted,

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SUPREME COURT OF ILLINOIS

Docket No. 80868 - Agenda 10 - March 1997.

CULT AWARENESS NETWORK, Appellant, v. CHURCH OF SCIENTOLOGY INTERNATIONAL et al., Appellees.

Filed September 18, 1997.

CHIEF JUSTICE FREEMAN delivered the opinion of the court:

Plaintiff, Cult Awareness Network, filed suit in the circuit court of Cook County against defendants, Church of Scientology International and Church of Scientology of Illinois (collectively, the Church of Scientology), as well as the law firm of Bowles & Moxon. In the complaint, as amended, plaintiff alleged that defendants had engaged in a conspiracy to maliciously prosecute numerous civil actions against plaintiff. The circuit court dismissed the suit for failure to state a cause of action. The court ruled that (i) plaintiff had failed to allege a favorable termination of the underlying actions and (ii) plaintiff had not satisfied the special damage requirement for actions sounding in malicious prosecution. The appellate court affirmed the order of dismissal (279 Ill. App. 3d 66), and we allowed plaintiff's petition for leave to appeal (155 Ill. 2d R. 315(a)). For the reasons that follow, we reverse the judgments of the appellate and circuit courts and remand the matter to the circuit court for further proceedings.

BACKGROUND

Because the circuit court dismissed this action pursuant to section 2-615 of the Code of Civil Procedure, we must take the factually sufficient allegations contained in plaintiff's complaint as true. See *Doe v. Calumet City*, 161 Ill. 2d 374, 381 (1994). Those allegations may be summarized in the following manner.

Plaintiff is a not-for profit corporation engaged in, among other things, educating the public with respect to religious rights, freedoms, and responsibilities. Defendants are

two religious corporations and their attorneys. Plaintiff claimed that defendants conspired with each other to carry on a campaign of malicious prosecution for the express purpose of causing plaintiff's bankruptcy and eventual disbandment. Specifically, plaintiff alleged that, between January 24, 1992, and July 1, 1993, various members of the Church of Scientology filed 21 lawsuits which named plaintiff as the defendant.[1] Plaintiff further alleged that the lawsuits were filed in several jurisdictions around the country, including Illinois, California, Massachusetts, Minnesota, New York, and Washington, D.C. All but one of the suits alleged that plaintiff had violated various state and federal civil rights laws by denying each complainant membership in plaintiff's organization and/or access to its meetings. The lone cause of action that did not contain such allegations was filed by a church member who claimed that plaintiff had fraudulently induced him to do volunteer work. Each of the underlying suits was alleged to have terminated in plaintiff's favor, either by summary judgment or by voluntary and involuntary dismissals.

After setting forth the details of the underlying suits, plaintiff further alleged that the filing of each of the lawsuits constituted a "separate overt act" in furtherance of the alleged conspiracy. In particular, plaintiff claimed that the Church of Scientology "suggested, instigated, encouraged, and assisted the

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[1] We note that plaintiff has stated in its brief that 24 separate suits were filed during this period. Moreover, the appellate court opinion also referred to plaintiff's allegations regarding 24 different actions. 279 Ill. App. 3d at 70. Nevertheless, our review of plaintiff's complaint reveals that in one of the actions, identified in the complaint as the "Ward et al. Lawsuits," four different church members were named as joint plaintiffs in a single suit. Therefore, only 21 lawsuits were actually referenced in plaintiff's complaint.

named plaintiffs in the [underlying] lawsuits and complaints." Plaintiff also alleged that Bowles & Moxon provided assistance and support to the Church of Scientology in each of the underlying lawsuits. According to plaintiff, each of those actions was filed without probable cause. Finally, plaintiff claimed that it had suffered damages as a result of the "multiplicity of actions brought by, at the behest of, or with the assistance of defendants." For example, plaintiff alleged that it had incurred substantial attorney fees and increased costs for liability insurance, among other things.

Defendants thereafter filed a motion to dismiss the complaint with prejudice for failure to state a cause of action. In support of their motion, defendants argued that none of the underlying suits had ended in a judicial termination that dealt with the factual issues of the case, and thus plaintiff had failed to allege that the actions had terminated in its favor as required under Illinois law. Moreover, defendants claimed that plaintiff had failed to satisfy Illinois' special injury requirement. In their view, the damages alleged by plaintiff constituted nothing more than the usual costs and anxiety associated with defending against an ordinary civil action. The circuit court agreed with both points and granted the motion to dismiss.

As previously noted, the appellate court affirmed the judgment of the circuit court. Although the court acknowledged that plaintiff had alleged that each of the underlying suits was terminated in its favor, either by summary judgment or by dismissal (both voluntary and involuntary), the court nevertheless held that such allegations were insufficient to satisfy the favorable termination requirement as that term had been defined in previous appellate court opinions. The court noted that, under Illinois law, "' [a] favorable termination for purposes of a malicious prosecution claim is one which deals with the *factual* issue or issues of a case.' (Emphasis added.)" 279 Ill. App. 3d at 70, quoting *Bismarck Hotel Co. v. Sutherland*, 175 Ill. App. 3d 739, 748 (1988). Plaintiff's

allegations, however, failed to indicate that the factual issues in the underlying actions had been adjudicated in plaintiff's favor. 279 Ill. App. 3d at 70. In addition, the appellate court held that plaintiff's allegations for damages did not satisfy the special injury requirement. Rather, the allegations merely constituted "the ordinary harm generated from any legal actions." 279 Ill. App. 3d at 72. Finally, the court rejected plaintiff's contention that the special damage requirement was satisfied by the multiple number of underlying suits at issue in this case. 279 Ill. App. 3d at 70.

ANALYSIS

The dispositive issue for our review is whether plaintiff has alleged sufficient facts to support a cause of action for civil conspiracy. However, because such an action necessarily depends upon the commission of some underlying tort (see *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 63 (1994); *Bonney v. King*, 201 Ill. 47, 50 (1903)), the viability of plaintiff's complaint in this case turns upon whether plaintiff has alleged enough facts to satisfy the elements of malicious prosecution. Therefore, it is appropriate that we examine those elements in determining the adequacy of plaintiff's charge.

In Illinois, the elements of malicious prosecution are well established. The plaintiff must show that the defendant brought the underlying suit maliciously and without probable cause. Moreover, the plaintiff must establish that the former action was terminated in his or her favor. Finally, the plaintiff must plead and prove some "special injury" or special damage beyond the usual expense, time or annoyance in defending a lawsuit. *Bank of Lyons v. Schultz*, 78 Ill. 2d 235, 239 (1980); *Schwartz v. Schwartz*, 366 Ill. 247, 250-53 (1937). In the present case, the parties dispute whether plaintiff has satisfactorily pleaded (i) the requisite favorable termination of the underlying suits and (ii) a special injury. We address each in turn.

Favorable Termination

The necessity of alleging a favorable termination in actions for malicious prosecution is a long-standing and deeply rooted principle in this court's jurisprudence. Indeed, as early as 1832, this court concluded that the former proceeding must have been legally determined in favor of the malicious prosecution plaintiff before the malicious prosecution action will lie. *Feazle v. Simpson*, 2 Ill. 30 (1832). Although this court has, over the years, consistently acknowledged the requirement (see *Bank of Lyons*, 78 Ill. 2d at 239; *Schwartz*, 366 Ill. at 250; *Shedd v. Patterson*, 302 Ill. 355, 359 (1922); *Bonney*, 201 Ill. at 50; *Smith v. Michigan Buggy Co.*, 175 Ill. 619, 629 (1898)), it has not had the occasion to identify, with any precision, the types of judicial determinations which constitute a "favorable termination" for purposes of malicious prosecution suits. As a result, the contours of the requirement have been shaped by our appellate court, which in 1970, announced that the favorable termination requirement could be satisfied only by "a judgment which deals with the *factual* issue of the case, whether the judgment be rendered after a trial or upon motion for summary judgment." (Emphasis added.) *Siegel v. City of Chicago*, 127 Ill. App. 2d 84, 108 (1970). Since that time, this holding has been relied upon without any detailed analysis, by numerous appellate court decisions, including that which we review today. See, *e.g., Kurek v. Kavanagh, Scully, Sudow, White & Frederick*, 50 Ill. App. 3d 1033, 1038 (1977); *Executive Commercial Services, Ltd. v. Daskalakis*, 74 Ill. App. 3d 760, 767 (1979); *Savage v. Seed*, 81 Ill. App. 3d 744, 749 (1980); *Smith v. Aaron, Aaron, Schimberg & Hess*, 112 Ill. App. 3d 653, 657 (1983); *Sutton v. Hofeld*, 118 Ill. App. 3d 65, 68 (1983); *Arora v. Chui*, 279 Ill. App. 3d 321, 329 (1996). Therefore, the propriety of the appellate court's action in this case is largely dependent upon the correctness of *Siegel* and it [*sic*] progeny.

In *Siegel*, the owners of certain property filed a

multicount complaint for declaratory relief against the City of Chicago. In the complaint, plaintiffs sought to nullify a zoning amendment that would have permitted another defendant, Stein, to erect a high-rise apartment building near plaintiffs' properties. Stein filed a counterclaim, alleging that one of the counts in plaintiffs' complaint was filed without probable cause and with malice, thereby constituting malicious prosecution. The circuit court, however, had previously dismissed the count which had given rise to Stein's counterclaim, and, as result, dismissed Stein's counterclaim as well. The court ruled that the dismissal of plaintiffs' count could not be viewed as a favorable termination for purposes of Stein's malicious prosecution action. Stein appealed the ruling.

The appellate court affirmed the judgment of the circuit court, holding that a dismissal of the former action could not qualify as a favorable termination in the context of a malicious prosecution suit. The court predicated its holding on the fact that the favorable termination requirement "goes to the question of probable cause." *Siegel*, 127 Ill. App. 2d at 107. As a result, the court reasoned that

> "the legal termination requirement necessitate[d] a judgment which deals with the *factual issue of the case*, whether the judgment be rendered after a trial or upon motion for summary judgment. However, it is not sufficient to simply obtain a dismissal of the opponents' complaint, for such dismissal need bear no logical relationship to the legitimacy of the assertions contained therein; therefore, such dismissal lends no credence to the claim that the assertions were baseless." (Emphasis added.) *Siegel*, 127 Ill. App. 2d at 108.

Consonant with this conclusion, the appellate court affirmed the dismissal of Stein's counterclaim.

As noted above, the *Siegel* analysis has, throughout the years, been relied upon by different panels of our appellate court, including the one which affirmed the circuit court's

judgment in this case. We note that several of these later appellate court opinions state that voluntary dismissals do not satisfy the favorable termination requirement and cite this court's decision in *Bonney* as authority for that proposition. See *Kurek*, 50 Ill. App. 3d at 1038; *Withall v. Capitol Federal Savings of America*, 164 Ill. App. 3d 851, 856 (1987). The *Siegel* court, however, did not rely on any of this court's opinions in formulating its analysis with respect to the favorable termination requirement. Moreover, a close reading of the *Bonney* decision reveals that the malicious prosecution plaintiff failed to allege that the underlying action claimed to have been wrongfully brought was ever "legally terminated." *Bonney*, 201 Ill. at 50. We stress that this court, in *Bonney*, never intimated, in any way, that voluntary dismissals did not satisfy the favorable termination requirement, and those appellate court decisions which so hold are simply incorrect as to this point.

Notwithstanding the above, defendants regard the appellate court's interpretation of the favorable termination requirement as a reasonable means of limiting a cause of action which has long been disfavored at law. They maintain that the *Siegel* holding finds support in this court's previous opinions which have recognized that actions for malicious prosecution inhibit the free access of the courts. In their view, a more expansive interpretation of the favorable termination requirement would lead litigants to fear subsequent prosecution simply for "calling upon the courts to determine [their] rights." Plaintiff, on the other hand, asks this court to overrule this line of cases, claiming that the appellate court has been overly restrictive in its interpretation of the favorable termination requirement. In support of its position, plaintiff points out that the holding in *Siegel* and its progeny conflicts with the views of many courts in other jurisdictions and the views of most modern commentators. As a result, although the tort of malicious prosecution is recognized in Illinois, plaintiffs

believe that the holding in *Siegel* has led to the virtual eradication of the cause of action in this state. Although we are not unmindful of the concerns raised by defendants, we agree with plaintiff that our appellate court's interpretation of the favorable termination requirement is at odds with modern tort law.

We begin our review of this issue with a discussion of the Restatement (Second) of Torts, which suggests looking beyond the type of disposition that was obtained in the previous action when determining if that termination is, indeed, "favorable" for purposes of a malicious prosecution action. Specifically, the Restatement provides as follows:

> "*Termination in favor of the person against whom civil proceedings are brought.* Civil proceedings may be terminated in favor of the person against whom they are brought *** by (1) the favorable adjudication of the claim by a competent tribunal, or (2) the withdrawal of the proceedings by the person bringing them, or (3) the dismissal of the proceedings because of his failure to prosecute them. A favorable adjudication may be by a judgment rendered by a court after trial, or upon demurrer or its equivalent. In either case the adjudication is a sufficient termination of the proceedings, unless an appeal is taken. ***
>
> Whether a withdrawal or an abandonment constitutes a final termination of the case in favor of the person against whom the proceedings are brought and whether the withdrawal is evidence of a lack of probable cause for their initiation, *depends upon the circumstances under which the proceedings are withdrawn.*" (Emphasis added.) Restatement (Second) of Torts §674, Comment *j* (1977).

Unlike the holding in *Siegel*, the Restatement approach, which has been expressly adopted by various courts across the nation (see, *e.g., Barrett Mobile Home Transport, Inc. v. McGuire*,

530 So. 2d 730, 735-36 (Ala. 1988); *Frey v. Stoneman*, 150 Ariz. 106, 110-11, 722 P.2d 274, 278-79 (1986); *Nelson v. Miller*, 233 Kan. 122, 125-26, 660 P.2d 1361, 1363-65 (1983); *Christian v. Lapidus*, 833 S.W.2d 71, 74 (Tenn. 1992)), allows dispositions which do not reach the merits of the underlying case to satisfy the favorable termination requirement in certain circumstances. Under this approach, whether or not the requirement is met is to be determined not by the *form* or *title* given to the disposition of the prior proceeding, but by the *circumstances* under which that disposition is obtained. In addition to the above cases, we note that other courts, while not expressly referring to the Restatement by name, have followed its approach. See *Abbott v. United Venture Capital, Inc.*, 718 F. Supp. 828, 833 (D. Nev. 1989) (compiling cases). Like those courts which have expressly adopted the Restatement, these courts also recognize that the existence of a favorable termination turns upon the *circumstances* under which the disposition is obtained. See *Weaver v. Superior Court*, 95 Cal. App. 3d 166, 184-85, 156 Cal. Rptr. 745, 755-56 (1979); *Wong v. Tabor*, 422 N.E.2d 1279, 1284-85 (Ind. App. 1981). As a result, terminations which do not rise to the level of adjudications on the merits may satisfy the favorable termination requirement. See, *e.g.*, 52 Am. Jur. 2d *Malicious Prosecution* §42 (1970). For example, if the dismissal was merely a formal means of securing a negotiated settlement, it cannot serve as the basis for a malicious prosecution action. See *Barrett Mobile Home Transport*, 530 So. 2d at 735-36. See also *Wong v. Tabor*, 422 N.E.2d 1279, 1284-85 (Ind. App. 1981) (same). Likewise, a malicious prosecution claim cannot be premised on a dismissal that was entered in order to enable the plaintiff to file the claim in another forum. See *Ramsey v. Leath*, 706 F.2d 1166, 1170-71 (11th Cir. 1983). Conversely, an involuntary dismissal resulting from plaintiff's failure to comply with discovery serves as a favorable termination due to the fact that a party who fails to produce evidence, in essence,

fails to prosecute. See *Lumpkin v. Friedman*, 131 Cal. App. 3d 450, 182 Cal. Rptr. 378 (1982); see also *Nagy v. McBurney*, 120 R.I. 925, 392 A.2d 365 (1978) (holding that involuntary dismissal for failure to file court-ordered bill of particulars constitutes favorable termination).

We agree with the reasoning espoused by the courts of our sister states. We regard the Restatement's treatment of the favorable termination requirement as more balanced than our appellate court's interpretation as set forth in *Siegel*. Nevertheless, defendants criticize the Restatement approach as being too sweeping in its scope. We disagree. Contrary to defendants' arguments, we do not necessarily view the Restatement's position, as expressed in the case law, as more expansive than our appellate court's interpretation. As the case law demonstrates, a favorable termination is limited to only those legal dispositions that can give rise to an inference of lack of probable cause. See also 54 C.J.S. *Malicious Prosecution* §54 (1987) (dismissal cannot serve as favorable termination if based solely on technical or procedural grounds). This, of course, was one of the goals of the *Siegel* court. See *Siegel*, 127 Ill. App. 2d at 107 (acknowledging that even if the malicious prosecution plaintiff has obtained a favorable termination in the underlying action, it "does not follow that [the underlying action had been] initiated without foundation"). Unlike *Siegel*, however, the analysis set forth in the Restatement contemplates that certain dispositions, although not obtained on the merits of the underlying facts, may under certain circumstances give rise to an inference of a lack of probable cause. In contrast, the *Siegel* rule has the unfortunate consequence of allowing those who utilize our courts for wrongful purposes to do so with impunity so long as they obtain a nonfactual disposition of the action. Under this approach, a disingenuous plaintiff can merely nonsuit his or her frivolous lawsuit in order to guard against a future malicious prosecution action. See *Arora*, 279 Ill. App.3d at 336 (McLaren, J., dissenting); see also *Marbourg*

v. Smith, 11 Kan. 554, 562-63 (1873) (recognizing, as early as 1873, the problems inherent in allowing a plaintiff to avoid a malicious prosecution action by nonsuit). In our view, the Restatement's position best balances the right of citizens to have free access to our courts and the right of the individual to be free from being haled into court without reason, thereby better serving the interests of justice.

Defendants also maintain that the existence of our Rule 137 provides an additional reason for this court not to depart from the appellate court's interpretation of the favorable termination requirement. They submit that the rule provides an adequate remedy for suits not well grounded in law or in fact. We must summarily reject this argument. Although Rule 137 was adopted as a means of preventing false and frivolous filings, it was not meant to preempt our existing tort law. The courts of this state have recognized, both before and after the adoption of Rule 137, the viability of a cause of action sounding in malicious prosecution.

In addition, our decision to follow the Restatement view on this issue is consistent with our recent opinion in *Swick v. Liautaud*, 169 Ill. 2d 504, 513 (1996). In *Swick*, we addressed whether a *nolle prosequi* was a favorable termination in the context of malicious prosecution of an underlying criminal action. This court, without dissent, adopted the Restatement's approach to the question and held that a *nolle prosequi* may serve as a favorable termination unless the prosecution was abandoned for reasons not indicative of the innocence of the accused. *Swick*, 169 Ill. 2d at 513. Indeed, we stressed that it was the *circumstances* surrounding the entry of the *nolle prosequi* that must be examined and not the mere form or title of the disposition. *Swick*, 169 Ill. 2d at 513-14. We today provide similar guidelines for malicious prosecution suits which are predicated upon prior *civil* proceedings.

Having adopted the Restatement approach, we find that plaintiff's complaint in this case, which alleges that each of the

underlying actions were terminated in its favor either by the entry of summary judgment or by dismissal (voluntary and involuntary), satisfies the favorable termination requirement, at least for purposes of defendant's motion to dismiss under section 2-615. Whether or not these dispositions ultimately *are proved by plaintiff* to be indicative of a lack of probable cause remains a question of fact which cannot be answered at this stage of the litigation. See *Swick*, 169 Ill. 2d at 514 (recognizing that at trial, plaintiff must adduce evidence to meet its burden of proof that the prior proceedings were terminated under circumstances indicative of plaintiff's innocence). See also *Nelson*, 233 Kan. at 125-26, 660 P.2d at 1364; *Abbott*, 718 F. Supp. at 834.

Accordingly, the circuit court erred in ruling that plaintiff had failed to sufficiently allege the favorable termination of the underlying actions at issue.

Special Damage or Injury

We must next determine whether plaintiff's complaint adequately pleaded special injury or damage. Like the favorable termination requirement, the necessity of pleading some special injury or damage is firmly rooted in our jurisprudence. In one of the earliest references to the requirement, this court, in 1898, examined whether damages can be recovered for the malicious prosecution of an "ordinary civil suit, begun by personal service of process, and unaccompanied either by an arrest of the person or by seizure of property." *Smith v. Michigan Buggy Co.*, 175 Ill. 619, 624 (1898). The underlying suit in question in *Smith* was an unsuccessful action for fraudulent misrepresentation brought by an employer against one its salesman. Citing both American and English common law principles, this court determined that without the arrest of the person or the seizure of the person's property or some "other special injury," a cause of action for the malicious prosecution would not lie in civil actions. *Smith*, 175 Ill. at 627. In reaching this conclusion, the

court stressed its decision was grounded upon the fact that the courts are open to every citizen to claim what "he deems to be his right without fear of being prosecuted for heavy damages." *Smith*, 175 Ill. at 628. Thus, the ordinary trouble and expense which arise from "*ordinary forms of legal controversy*, should be endured by the law-abiding citizen as one of the inevitable burdens, which men must sustain under civil government." (Emphasis added.) *Smith*, 175 Ill. at 629.

The issue of what type of lawsuit constitutes an "ordinary form of legal controversy" was again addressed by this court some 22 years later in *Norin v. Scheldt Manufacturing Co.*, 297 Ill. 521 (1921). There, the Scheldt Manufacturing Company filed a petition in bankruptcy against Norin, requesting that Norin be adjudged a bankrupt. Scheldt filed the petition on publication alone. When Norin failed to appear in the proceeding, the court entered a bankruptcy judgment against him. Norin later learned of the bankruptcy action and began *vacatur* proceedings. During the hearing to set aside the default, one of Scheldt's officers admitted he had known Norin's place of residence at the time service by publication was obtained. Moreover, Scheldt admitted that it had been unable to prove Norin's insolvency at the time it filed its petition. Accordingly, the court vacated its previous judgment and dismissed the bankruptcy petition. Norin thereafter brought suit against Scheldt to recover damages for the malicious prosecution of the bankruptcy action. Scheldt contended that Norin had failed to satisfy the special injury requirement because (i) the bankruptcy judgment had ultimately been vacated, and (ii) Norin's property had not been seized. Scheldt concluded therefore that the bankruptcy litigation constituted a mere "ordinary" civil action. On appeal, this court rejected that argument. In doing so, we concluded that the bankruptcy action could not be considered ordinary because of the "far-reaching and drastic" effects associated with that proceeding. *Norin*, 297 Ill. at 525. In fact, because of the

peculiar, *sui generis* nature of a bankruptcy action, this court deemed irrelevant the fact that Norin's property was not seized. We explained that suits "which are themselves unusual in their effect upon the defendant" fall outside the special injury requirement established in *Smith. Norin*, 297 Ill. at 527.

Subsequently, in *Shedd v. Patterson*, 302 Ill. 355 (1922), this court had further opportunity to shape the contours of the special injury requirement. In that case, the plaintiff brought a malicious prosecution action against defendant after the defendant had filed nine successive lawsuits against plaintiff, all of which related to the foreclosure of a leasehold estate for unpaid rents. The circuit court dismissed the action, and the appellate court affirmed. The appellate court ruled that under this court's decisions in *Smith and Norin*, the nine unsuccessful prior actions constituted "ordinary" litigation; therefore, plaintiff had not suffered any special injury. This court thereafter granted plaintiff leave to appeal and reversed the judgment of the appellate court. Although this court initially acknowledged that the Illinois courts are open to all litigants for the settlement of their rights without fear of retributive litigation, it nevertheless held that *Smith and Norin* could not be viewed as providing immunity in the case of successive suits after a party has had his or her rights finally adjudicated. *Shedd*, 302 Ill. at 360. Specifically the court stated that after a party has "had his day in court and his right has been conclusively determined," he may not return to court to "harass" the same opponent about the same issues. *Shedd*, 302 Ill. at 360.

It is against this precedential backdrop, and, in particular, *Shedd*, that we must examine whether the special injury rule has been satisfied by the facts as alleged in this case. Defendants maintain that although multiple suits are involved here, the instant case is distinguishable from *Shedd* because each of the prior actions here were brought by different plaintiffs in different jurisdictions, concerning different sets of operative facts. Defendants also point out that each of the prior

actions in *Shedd*, unlike those here, were filed successively after the first action had been finally and conclusively determined. Plaintiff, on the other hand, acknowledges the dissimilarities between the cases, but nevertheless submits that the principles concerning multiple suits announced in *Shedd* apply with equal force to the case at bar. Plaintiff contends that the filing of 21 meritless lawsuits against plaintiff during a 17-month period constitutes a special injury regardless of the fact that the suits were filed concurrently rather than consecutively. Plaintiff submits, therefore, that it should be allowed a remedy for this harm.

We agree with defendants that *Shedd* is factually distinguishable from the case at bar. In *Shedd*, this court was confronted with a single litigant who, having invoked the power of the judiciary to decide his grievance and having lost, refused to accept the judgment of the court and continued to litigate the matter. This court would not permit the court system to be used in such a manner, and thus it stated in pertinent part:

> "Law is the foundation of civil government, and its administration and the means for its enforcement are essential to the maintenance of rights and the stability of the social order. To that end courts are created and maintained at the public expense, and are, and should be, open for the redress of grievances and the enforcement of rights, but that affords no reason for requiring them to employ their time to the prejudice of other litigants and the public business, to enable a party whose rights have been finally and conclusively determined to harass the same party about the same thing. *** In this case the courts had repeatedly decided that the defendant had no grievance, and the substantial questions involved were finally and conclusively settled [15 years earlier] in *Patterson v. Northern Trust Co.*, 231 Ill. 22." *Shedd*, 302 Ill. at 360-61.

Clearly, what concerned this court in *Shedd*, to a large extent,

was the fact that a litigant who had already been given his day in court, and had lost, continued to use the same purported grievance as a subterfuge for conducting a personal crusade of harassment under the guise of rightful litigation. In this case, however, the same plaintiff is not involved in repeated litigation and the multiple suits in question were not filed successively but concurrently. Therefore, *Shedd* is factually inapposite to the case at bar.

Nevertheless, the fact that *Shedd* is not factually on all fours with the present case does not spell victory for defendants. A common theme with respect to the special injury rule which runs throughout all of this court's opinions on the subject, including *Shedd*, is this court's recognition of its responsibility to maintain a proper balance between the societal interest in preventing harassing suits and in permitting the honest assertion of rights in our court rooms. See *Shedd*, 302 Ill. at 360. As our case law amply demonstrates, it is this balance which lies at the heart of the special injury rule (see *Smith*, 175 Ill. at 628-29; *Norin*, 297 Ill. at 526-27; see also *Friedman v. Dozorc*, 412 Mich. 1, 67, 312 N.W.2d 585, 612 (1981) (Coleman, C.J., dissenting in part and concurring in part); Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 Yale L.J. 1218, 1230 (1979)), and it is this balance, and not the facts in *Shedd*, which ultimately must determine the propriety of the instant action. Ironically, it is one of the critical differences between the facts in *Shedd* and the facts as alleged in this case which compels the conclusion that this delicate balance has been upset in this case. In contrast to *Shedd*, which involved only two litigants disputing the foreclosure of a leasehold estate, the present case involves allegations that a large national corporation improperly induced its members to engage in a national campaign of simultaneous malicious prosecution. Plaintiff has alleged that the Church of Scientology instituted the simultaneous suits, not to resolve any legal dispute between

the parties, but to keep plaintiff from engaging in its business of disseminating information regarding religious freedom. The invidiousness of the alleged conspiracy is best reflected in the fact that plaintiff was sued 21 times over the course of a 17-month period in jurisdictions ranging from New York to California. Such a sustained onslaught of litigation can hardly be deemed "ordinary" if plaintiff can prove that the actions were brought without probable cause and with malice. In view of these circumstances, we believe that plaintiff has set forth facts, which if proved true, satisfy our special injury rule.

Notwithstanding the above, defendants submit that if this court were to conclude that the special injury requirement has been met in this case, we would be infringing upon defendants' exercise of their first amendment rights. Specifically, defendants rely upon several United States Supreme Court decisions which have held that the litigation activities of a national membership organization, including encouraging, financing, and coordinating a series of lawsuits challenging discriminatory practices, are protected by the first amendment. See *National Ass'n for the Advancement of Colored People v. Button*, 371 U.S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963); *United Mine Workers of America, District 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967). While we do not dispute the correctness of these Supreme Court decisions, we do dispute the defendants' reliance upon them. The Constitution affords protection to the *honest* litigator in search of resolutions to *true* legal disputes; however, it does not provide the right to any individual to assist another, with money or otherwise, in the prosecution of a suit which has been filed with malice and without probable cause. In any event, we stress that defendants have challenged plaintiff's complaint by way of a section 2-615 motion to dismiss. Such a motion merely addresses the allegations contained within the four corners of plaintiff's complaint. Therefore, defendants' constitutional argument, which is a

fact-dependent defense to the action grounded in probable cause, cannot be considered in the context of the present motion to dismiss. Nothing in our opinion prevents defendants from raising the first amendment's protections at the appropriate juncture in this case.

As a final matter, we wish to stress that our holding with respect to the special injury requirement should not be viewed as a rejection of the rule as set forth in our earlier opinions. We further emphasize that today's decision should not be read to mitigate the strict requirement that a malicious prosecution plaintiff show not only that the action complained of has been terminated, but that it was commenced maliciously and without probable cause. These latter two required elements are no easy hurdle for a plaintiff, as many courts and commentators have noted. See *Barrett*, 530 So. 2d at 735-36; *Friedman*, 412 Mich. at 65-66, 312 N.W.2d at 611 (Coleman, C.J., dissenting in part and concurring in part); *Kaufman v. Shefman*, 169 Mich. App. 829, 840, 426 N.W.2d 819, 824 (1988); Restatement (Second) of Torts §675, Comments *a* through *d* (1976). An action for malicious prosecution remains one that is disfavored in law.

CONCLUSION

In view of the foregoing analysis, we hold that plaintiff has sufficiently alleged the elements of the tort of malicious prosecution and, for purposes of this case, the tort of civil conspiracy to commit malicious prosecution. The circuit court, therefore, erred in dismissing the amended complaint. Accordingly, we reverse the judgments of the appellate and circuit courts, and remand the matter to the circuit court for further proceedings consistent with this opinion.

Judgments reversed;
cause remanded.

JUSTICE McMORROW took no part in the consideration or decision of this case.

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT
THIRD DIVISION
March 29, 1996

No. 1-95-1842

CULT AWARENESS NETWORK,	) Appeal from the
	) Circuit Court of
Plaintiff-Appellant,	) Cook County
	)
v.	)
	)
CHURCH OF SCIENTOLOGY	)
INTERNATIONAL,	)
BOWLES & MOXON, and	) Honorable
CHURCH OF	) Kenneth L. Gillis and
SCIENTOLOGY OF ILLINOIS,	) Julia M. Nowicki,
	) Judges Presiding.
Defendants-Appellees.	)

JUSTICE GREIMAN delivered the opinion of the court:

Plaintiff Cult Awareness Network appeals the trial court's dismissal with prejudice of its one-count second amended complaint alleging a cause of action for conspiracy to engage in malicious prosection [*sic*] against defendants Church of Scientology International, Bowles & Moxon, and Church of

Scientology of Illinois.

On appeal plaintiff asserts that the trial court erred in dismissing plaintiff's complaint for failure to state a cause of action for conspiracy to engage in malicious prosecution and that this court should consider whether the complaint states a cause of action for abuse of process even though plaintiff failed to raise such cause of action until this appeal.

We affirm the dismissal of plaintiff's complaint and find that plaintiff waived its abuse of process claim.

In January 1994 plaintiff first filed a five-count complaint against the currently named defendants and 11 individual members of the Church of Scientology. The complaint alleged (1) conspiracy to engage in malicious prosecution; (2) malicious prosecution; (3) conspiracy to interfere with right of assembly and association; (4) infringement of right of association and assembly; and (5) maintenance. After defendants filed a section 2-615 motion to dismiss (735 ILCS 5/2-615 (West 1992)), plaintiff voluntarily

withdrew its complaint.

Thereafter, on June 8, 1994, plaintiff filed a four-count first amended complaint against the same defendants named in the original complaint. Unlike the original complaint, the first amended complaint did not include a cause of action for malicious prosecution. Similar to the original complaint, however, the first amended complaint alleged (1) conspiracy to engage in malicious prosecution, (2) conspiracy to interfere with right of association and assembly, (3) infringement of right of association, and (4) maintenance. On August 4, 1994, defendants filed a motion to dismiss pursuant to section 2-615(b) and (e). Thereafter, the trial court dismissed the first amended complaint with leave to replead only the count alleging conspiracy to commit malicious prosecution as to certain specified underlying prosecutions.

On October 24, 1994, plaintiff filed its one-count second amended complaint, which is now at issue, alleging only conspiracy to engage in malicious prosecution. Plaintiff

alleged that defendants conspired with each other to file at least 24 unfounded lawsuits against plaintiff. The 24 lawsuits were filed in various State and Federal courts in six or seven jurisdictions across the United States. With only one exception, the essential claim in all the lawsuits was that plaintiff unlawfully denied access to the various complainants who were associated with scientology. The one exception was a lawsuit filed by Jonathan Nordquist in which he alleged that plaintiff had fraudulently induced him to do volunteer work for plaintiff.

On December 14, 1994, defendants filed a motion to dismiss with prejudice for failure to state a cause of action pursuant to section 2-615(b).

Following a hearing on May 10, 1995, the trial court dismissed the complaint with prejudice when plaintiff informed the trial court that it did not wish to replead.

On appeal, plaintiff asserts that the requirements for a malicious prosecution claim are satisfied in the allegations in its complaint. Plaintiff primarily argues that the multiple

underlying lawsuits distinguish its cause of action from cases which involved only a single underlying lawsuit.

Defendants contend that plaintiff's complaint failed to state a claim for malicious prosecution because it failed to make the required factual allegations to satisfy the favorable termination requirement and failed to allege special damages as required under Illinois law.

This court applies a de novo standard of review where a complaint is dismissed pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 1992)). (Majumdar v. Lurie, 274 Ill. App. 3d 267, 268, 653 N.E.2d 915 (1995).) To determine whether the plaintiff has stated a cause of action upon which relief could be granted, this court must accept as true all well-pled facts in its complaint and must draw all reasonable inferences from those facts which are favorable to the plaintiff. (Majumdar, 274 Ill. App. 3d at 268.) This court, however, does not accept as true any conclusions of law or fact contained within the complaint which are unsupported by

allegations of specific facts upon which those conclusions rest. Majumdar, 274 Ill. App. 3d at 268 (reversed the dismissal of the complaint).

To sustain an action for malicious prosecution based on a civil lawsuit, a plaintiff must allege facts sufficient to show that: (1) the lawsuit which plaintiff claims was wrongfully filed was terminated in his favor; (2) the wrongfully-filed lawsuit was brought maliciously and without probable cause; and (3) the plaintiff suffered some special injury or special damage beyond the usual expense, time, annoyance or inconvenience in defending a lawsuit. Bank of Lyons v. Schultz, 78 Ill. 2d 235, 239, 399 N.E.2d 1286 (1980); Levin v. King, 271 Ill. App. 3d 728, 730, 648 N.E.2d 1108 (1995) (plaintiff failed to plead special damages).

Regarding the first element, the instant complaint alleges that the 24 lawsuits underlying plaintiff's malicious prosecution claim were variously ended by summary judgments, motions to dismiss, dismissals with prejudice and

voluntary dismissals.

Neither voluntary nor involuntary dismissals satisfy the favorable termination element. (Bismarck Hotel Co. v. Sutherland, 175 Ill. App. 3d 739, 748, 529 N.E.2d 1091 (1988) (Bismarck Hotel II) (and cases cited therein).) "A favorable termination for purposes of a malicious prosecution claim is one which deals with the factual issue or issues of a case." (Emphasis added.) (Bismarck Hotel II, 175 Ill. App. 3d at 748; Siegel v. City of Chicago, 127 Ill. App. 2d 84, 108, 261 N.E.2d 802 (1970).) This rule obtains even though such dismissals may constitute adjudications on the merits under Supreme Court Rule 273. Bismarck Hotel II, 175 Ill. App. 3d at 748; 134 Ill. 2d R. 273.

In Bismarck Hotel II the plaintiff-landlord had filed three forcible entry and detainer actions against the defendant-tenant. (Bismarck Hotel II, 175 Ill. App. 3d 739.) In the first forcible entry and detainer action, the trial court granted the plaintiff-landlord's motion for summary judgment and denied

the defendant-tenant's same motion. On appeal in the first action, this court reversed the summary judgment entered in favor of the plaintiff and entered summary judgment in favor of the defendant as to defendant's right to possession of the premises as a month-to-month tenant. Bismarck Hotel Co. v. Sutherland, 92 Ill. App. 3d 167, 175, 415 N.E.2d 517 (1980) (Bismarck Hotel I).

Thereafter, a second forcible entry and detainer action was dismissed by the circuit court as premature. The plaintiff's third forcible entry and detainer action, which went through a bench trial, was on appeal in the Bismarck Hotel II case. In the plaintiff's third lawsuit, the defendant filed a counterclaim including a count alleging malicious use of process which the trial court struck. On appeal, this court held that the "plaintiff's first forcible entry and detainer action for possession of the demised premises terminated in defendant's favor" for purposes of malicious prosecution. Bismarck Hotel II, 175 Ill. App. 3d at 748.

From Bismarck Hotel II, the present plaintiff argues that, at a minimum, the eight lawsuits which resulted in summary judgment for plaintiff should suffice to satisfy the favorable termination element for its malicious prosecution claim. We disagree.

The summary judgment which was held to suffice for purposes of the favorable termination element in Bismarck Hotel II was entered in favor of the defendant on appeal in Bismarck Hotel I where this court discussed the case in detail and made factual findings favorable to him. In contrast, the present complaint includes no allegations that actual favorable findings were made and instead relies on the mere entry of the summary judgment orders in its favor. A mere grant of summary judgment without more does not necessarily mean that the facts were decided in favor of any one party. See Downing v. Chicago Transit Authority, 162 Ill. 2d 70, 77, 642 N.E.2d 456 (1994) ("[c]ourts cannot ignore the basis on which the summary judgment was granted").

We find that the allegations of the complaint as to the dispositions of the underlying lawsuits fail to satisfy the favorable termination element.

The special injury or special damage element requires more than the usual expense, time, annoyance or inconvenience expended in defending a lawsuit. (Bank of Lyons, 78 Ill. 2d at 239; Levin, 271 Ill. App. 3d at 730.) The special injury or special damage element of a malicious prosecution claim "has usually been identified with an arrest or seizure of property or some constructive taking or interference with the person or property." Levin, 271 Ill. App. 3d at 731.

In paragraph 91 of its complaint, plaintiff alleges its damages as follows:

> "91. CAN has been damaged by the multiplicity of actions brought by, at the behest of, or with the assistance of defendants, as set forth above, [1] in that it has incurred substantial attorneys fees and other legal costs in connection with the defense of the aforesaid actions; [2] in that CAN's insurance costs have increased substantially and CAN has become unable to obtain directors and officers liability

> insurance; [3] in that CAN's board members, paid staff, and volunteers have spent a substantial amount of time in activities related to the ligation [sic]; and [4] in that CAN's board members, paid staff, and volunteers have not spent the time that they have devoted to the litigation related activities to engaging in CAN's public education activities and their own associational activities."

We find that the allegations for damages do not satisfy the special injury requirement for purposes of a malicious prosecution claim but instead constitute the ordinary harm generated from any legal actions.

We also are not persuaded to find differently by the two cases on which plaintiff relies to support the favorable termination requirement and the special injury element, i.e., Shedd v. Patterson, 302 Ill. 355, 134 N.E. 705 (1922) and Payne v. Donegan, 9 Ill. App. 566 (1882). Plaintiff maintains that Shedd and Payne demonstrate that the filing of multiple frivolous lawsuits itself supports a finding of lack of probable cause, obviating the need to strictly construe the favorable termination requirement to insure compliance with that

element.

Neither Shedd nor Payne directly addressed the favorable termination element but rather turned upon the special injury element. Moreover, the underlying lawsuits which initiated the malicious prosecution claim in those cases were all actions asserting the same cause of action arising from the same facts and were brought by the same plaintiff against the same defendants. Furthermore, in Shedd, the successive suits occurred after the party accused of malicious prosecution had his day in court and after "the final and conclusive determination of his rights by this court." (Shedd, 302 Ill. at 360-61). The Shedd court specifically found that:

> "In this case the court had repeatedly decided that the defendant had no grievance, and the substantial questions involved were finally and conclusively settled in 1907 (citation omitted)." Shedd, 302 Ill. at 361.

Moreover, actions for malicious prosecution have long been disfavored in Illinois courts. (Shedd, 302 Ill. at 359; Levin, 271 Ill. App. 3d at 730.) In Shedd, the supreme court

explained the disfavored status of a malicious prosecution claim as follows:

> "This court has regarded it reasonable that the action should be limited because the courts of law are open to every citizen upon the penalty of lawful costs, and he may have his rights determined without the risk of being sued and having to respond in damages for seeking to enforce his right." Shedd, 302 Ill. at 359.

The Shedd court relied upon its prior decision in Smith v. Michigan Buggy Co., 175 Ill. 619, 51 N.E. 569 (1898), where the supreme court expressed its concern about the danger of such an action:

> "[T]he danger is that litigation will be promoted and encouraged by permitting such suits as the present action to be brought. This is so, because the conclusion of one suit would be but the beginning of another. A defendant, who had secured a favorable result in the suit against him, would be tempted to bring another suit for the purpose of showing, that there had been malice and want of probable cause in the prosecution of the first suit which he had won. Litigation would thus become interminable." Smith, 175 Ill. at 629.

We find that neither the favorable termination

requirement nor the special injury element is sufficiently pled in the complaint. Plaintiff urges us to veer from the stringent requirements established for a malicious prosecution claim; however, the principles established in case law are quire clear and we cannot ignore them.

Next plaintiff asserts that the flexibility of the waiver rule allows this court to consider whether the factual allegations in a complaint state a cause of action for abuse of process although that claim is not included in the complaint and although plaintiff raised it for the first time on appeal.

It is well-established that "issues not raised in the trial court may not be raised for the first time on appeal." (Eagan v. Chicago Transit Authority, 158 Ill. 2d 527, 534, 634 N.E.2d 1093 (1994).) In Eagan, the supreme court held that the plaintiff waived the issue of a special duty exception to immunity conferred by statute (Metropolitan Transit Authority Act) because he failed to raise it in his complaint and did not amend his complaint to include this exception. Notably, the

appellate court in Eagan not only addressed the special duty exception but relied on it to find that the defendant was not protected by this statutory immunity. The supreme court, however, reversed the appellate court and held that the plaintiff had waived the special duty exception and thus it was not properly before the court. (Eagan, 158 Ill. 2d at 534-35.) Like the present plaintiff, the Eagan plaintiff, upon the defendant's motion to dismiss in the trial court, elected to stand by his complaint and did not seek to amend. Eagan, 158 Ill. 2d at 530.

Plaintiffs [*sic*] already have filed three complaints in this matter and expressly elected to stand on its complaint even when the trial court afforded it yet another opportunity to amend at the hearing on defendants' motion to dismiss. Plaintiffs [*sic*] admit that the abuse of process claim was never raised until this appeal and we thus find the claim has been waived.

For all the foregoing reasons, we affirm the trial court's dismissal with prejudice of plaintiff's second amended

complaint.

Affirmed.

RIZZI, P.J., and CERDA, J., concur.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Cult Awareness Network	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 94 L 804
	:	
Church of Scientology International, Bowles & Moxon; and Church of Scientology of Illinois,	:	
	:	
Defendants.	:	

ORDER

This matter coming on for hearing on Defendants' § 2-615(b) Motion to Dismiss the second amended verified Complaint by prior court order, counsel for the parties being present and the Court having heard argument,

IT IS HEREBY ORDERED THAT:

Defendants' motion is granted and the second amended complaint is dismissed with prejudice.

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Name R. Peter Carey
Attorney for Defendants
Address 120 N. La Salle Street
City Chicago, IL 60602
Telephone (312) 236-7080

Judge Julia M. Nowicki
May 10, 1995
Circuit Court #293

ENTER:
JM Nowicki /s/
Judge Judge's No.

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION
Filed September 26, 1994

Cult Awareness Network,

Plaintiff,

vs. 94 L 804

Church of Scientology International,
et al.,

Defendants.

ORDER

The plaintiff, Cult Awareness Network, has brought a four count First Amended Complaint, which sets out 41 matters of underlying litigation from 7 states and the District of Columbia, each against the plaintiff, "Cult Awareness Network," (CAN) or some affiliate, mostly by a person or persons described as "a member (or members) of the Church of Scientology." Para. 120 alleges that the 41 suits were brought "to impede and prevent CAN from performing its public education functions," but the complaint never seems to plead that the underlying suits were brought for the benefit of the Church of Scientology International. (COSI).

The underlying suits pleaded were brought between November of 1991 and November of 1993, with 29 of them brought in 1992. The most common complaint in the underlying suit is that the defendants there (CAN or CAN affiliates) refused to allow the plaintiffs to join CAN, or refused to recognize organizations as CAN affiliates, or, in one case, refused the underlying plaintiffs to volunteer their services to CAN. (Para. 31) Some underlying suits complained of denials

of admission to CAN's annual meetings. (paras. 37, 49, 51).

Count 1 pleads "Conspiracy To Engage In Malicious Prosecution." Count 2 "Conspiracy To Interfere With Right Of Assembly and Association." Count 3 "Infringement Of Right Of Association and Assembly," and Count 4, against the Church of Scientology International (COSI) and the law firm of Bowles & Moxon, with the common law action of Maintenance.

Six defendants, COSI, Bowles & Moxon, Melberg, Lewis, Bashaw and COSO Illinois move to dismiss the complaint under 735 ILCS 5/2-615(b) and (e), arguing that Count 1 rests on instances of "malicious prosecution" and "unless the original complaints (in the alleged suits against plaintiff) constitute actionable claims for malicious prosecution, there can be no conspiracy to engage in malicious prosecution."

Those six defendants also move to dismiss Counts 2 and 3 because the counts fail to allege the existence of state action, arguing that the right of association and the right of assembly under the Illinois Constitution are rights guaranteed to the people against governmental interference, and do not restrict the actions or activities of private persons, corporations or organizations unless state action is involved.

These six defendants also move to dismiss Count 4 because Illinois has abolished the common law action of maintenance, citing Brush v. City of Carbondale, 229 Ill. 144. See 14 CJS 356, Champerty and Maintenance. 705 ILCS 215/26 does provide a criminal penalty for intermeddling in legal actions of others. The question is whether a civil action is possible.

Count 1.

In order to bring a conspiracy to commit malicious prosecution case, as defendants argue, there must be valid pleadings of instances of malicious prosecution. Malicious Prosecution is a disfavored cause of action because citizens should have free access to the courts to seek remedies for perceived wrongs, and such citizens should not be deterred from suing by fear of a subsequent prosecution against them. Berlin v. Nathan, 64 Ill. App. 3d 940; Schwartz v. Schwartz, 366 Ill. 247.

Courts maintain remedies to tax a plaintiff who brings a meritless law suit. See Supreme Court Rule 137.

The plaintiff responds to the six defendants motions to dismiss by arguing that there are five elements to an action for "Malicious Prosecution," and that plaintiff has pleaded all of them, including termination of the proceedings in favor of the plaintiff and special damages.

About "Malicious Prosecution," plaintiff argues that where, as here, there are pleadings of multiple underlying suits, as contrasted with a single underlying suit, "courts have been much more liberal in allowing (a) malicious prosecution claim to proceed."

But, as the defendants point out the 41 underlying cases did uniformly terminate "in favor of" the plaintiff, CAN. Several of the underlying actions are still pending. (Barton suit, pending in part, para. 40; Lippman lawsuit, para. 72; Wilson/Sterling lawsuit, para. 85; Haggerty lawsuit, para. 94; Batterschall lawsuit, para. 108; Meizes/Seidler actions, para. 110; Bashaw action, para. 112. Church of Scientology Of Orange County, dismissed, with leave to amend the complaint. para. 69. New York lawsuits, two suits remain pending, para.

98.

In order for there to be a precedent for a malicious prosecutions suit, there must be an adjudication of the facts favorable to the plaintiff in the malicious prosecution suit. Sutton v. Hofeld, 118 Ill. App. 3d 65. Here, many of the 41 underlying suits were dismissed on jurisdictional or other non-substantive grounds.

See the Bagley lawsuit, "moot", para. 23; Demeter lawsuit, voluntarily dismissed, para. 30; Bashaw lawsuit, "lack of jurisdiction", para. 33; Neilson lawsuit, "judgment paid", para. 36; Slesar/Wessling lawsuits, insufficient damages and a lack of "subject matter jurisdiction", para. 45; Woodard lawsuit, voluntarily dismissed, para. 54; Harness lawsuit, voluntarily dismissed, para. 57; Beardmore and Shaw lawsuits, voluntarily dismissed; Massachusetts lawsuits, voluntarily dismissed, para. 88; Oregan lawsuit, voluntarily dismissed, para. 100. As to these cases, as the pending cases, CAN cannot plead that it prevailed on the merits in the underlying suits or actions.

Defendants point out that other underlying cases were pending at the time of the Complaint, but were disposed of before the Amended Complaint. I do not reach this issue, since the cases have apparently been disposed of now.

Still others of the 41 cases have unusual histories. In one of them, a Counterclaim is complained of. (Demeter/ Cross, para. 28) There is no mention of what the first party action was. The Nordquist litigation may contain a statement that the lawsuit "was without foundation in fact." See para. 19.

However, some of the underlying cases were disposed of on the grounds that under the federal Civil Rights Act, 42 U.S.C. 1983 et seq. the plaintiff, CAN, was not a "place of

public accommodation" under 42 U.S.C. 2000. Others were dismissed because of the California Civil Rights Act did not protect access to private associations. There are at least 15 underlying cases in these categories, which seem to have been dismissed, or summary judgment granted, because individuals do not have a right to join or participate in the plaintiff organization, if the leaders of the plaintiff organization do not want them. Equal access to private property or private organizations is not a constitutional right per se. People v. DiGuida, 152 Ill.2d 104. The plaintiff may be able to plead a valid cause of action from these underlying cases.

The question which will come to the Court is whether these 15 underlying cases might constitute a valid cause of action for Conspiracy to Engage in Malicious Prosecution. I will strike Count 1 with leave to replead as to cases that ended with findings similar to the findings, which I have indicated: that the plaintiff organization is not a "pubic accommodation" under the law. These could be favorable dispositions under the law. The Nordquist case may also be included.

I would add that I believe that the defendants are correct that Malicious Prosecution requires a detailed pleading of Special Damages. I do not reach this issue today. See Kurek v. Kavanaugh, 50 Ill. App. 3d 1033. The Second Amended Complaint should not attempt to impress by virtue of its size, but by its inherent merit.

Count 2 and 3.

The United States Constitution guarantees that citizens shall have a right to freedom of association and the right to assembly. These great rights were not new in 1789. See the Magna Charta, 1215, and the Declaration of the Rights of Man adopted by the French Assembly in 1789. It is very clear that these rights were to protect people from the possibly heavy

hand of government.

The Illinois Constitution contains similar guarantees to those of the United States Constitution. Plaintiffs [*sic*] here seek to base causes of action on a reading of Article I of the Illinois Constitution which would expand the right of assembly and freedom of association to guarantee rights to citizens because of the perceived infringement of those rights by other citizens.

While the Illinois Constitution may be "locked" to the federal Constitution, or it may have broader protections, under no circumstances could the Illinois Constitution be turned around 180 degrees to mean something completely different from what the United States Constitution means.

People v. DiGuida, 152 Ill. 2d 104, speaks to these issues clearly. Counts 2 and 3 will be dismissed with prejudice. Plaintiff has preserved the issues for appeal.

Count 4.

Count 4 will also be dismissed with prejudice. There is not a civil cause of action for maintenance. Galinski v. Kessler, 134 Ill. App. 3d 602. The criminal penalties of 705 ILCS 215/26 preempt the area of this seldom encountered conduct. Curtailing of improper lawsuits is the jurisdiction of the courts and other branches of government.

Further, "assistance and support" in a lawsuit is protected speech and conduct under the Constitution. The purpose of organizations is to advance ideas and beliefs, and then give "assistance and support" to its members. Plaintiff has preserved this issue for appeal.

Plaintiff shall have 28 days to replead Count 1 of the

Second Amended Complaint, consistent with this order. It is so ordered.

THE COURT

Kenneth L. Gillis /s/
Kenneth L. Gillis, Judge

No. 97-1006

Supreme Court, U.S.
FILED
FEB 19 [illegible]
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

CHURCH OF SCIENTOLOGY INTERNATIONAL, BOWLES & MOXON, AND CHURCH OF SCIENTOLOGY OF ILLINOIS,
Petitioners,

v.

CULT AWARENESS NETWORK, *Respondent*.

On Petition For A Writ of Certiorari To The Supreme Court of Illinois

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under 28 U.S.C. § 1257(a) to review a non-final decision of the Supreme Court of Illinois in which that court reversed the dismissal of the complaint, declined to consider the only federal issue in the case, and remanded the case for further proceedings in the state trial court.

2. Whether this Court should avoid deciding the federal constitutional question presented by petitioners, when that question has not been finally decided by the Supreme Court of Illinois and may become moot depending on the outcome of the case on remand in the state courts.

3. Whether instigating and maintaining over 20 meritless civil suits, with malice and without probable cause, for the purpose of harassing and eliminating a competitor in the marketplace of ideas — as set forth in the allegations of the complaint (which must be accepted as true at this stage of the case) — constitutes protected activity under the First Amendment.

RULE 29.6 STATEMENT

Respondent Cult Awareness Network has no parent companies or subsidiaries to list pursuant to Supreme Court Rule 29.6.

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BRIEF FOR CULT AWARENESS NETWORK IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (Pet. App. 1a-18a) is reported at 177 Ill. 2d 267, 685 N.E.2d 1347 (1997). The opinion of the Appellate Court of Illinois (Pet. App. 19a-34a) is reported at 279 Ill. App. 3d 66, 664 N.E.2d 217 (1st Dist. 1996). The orders of the Circuit Court of Cook County (Pet. App. 35a-42a) are unreported.

JURISDICTION

The opinion of the Supreme Court of Illinois was issued on September 18, 1997. The petition for writ of certiorari was filed on December 16, 1997. Petitioners purport to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a), but as explained in detail below, this Court lacks jurisdiction to review the interlocutory order of the Supreme Court of Illinois — that court reversed the dismissal of respondent's complaint, declined to address the merits of petitioners' First Amendment defense because it was premature, and remanded for further proceedings in the state trial court. Pet. App. 18a.

STATEMENT

This is an action governed by Illinois law alleging a conspiracy to maliciously prosecute more than 20 meritless civil suits, against a small, not-for-profit organization and its affiliates, in several jurisdictions across the country. As the Supreme Court of Illinois noted, because defendants "challenged plaintiff's complaint by way of a * * * motion to dismiss," Pet. App. 17a, the allegations of the complaint (R. C74-106, R. C212-231) must be taken as true at this stage of the proceedings. Pet. App. 1a.

A. Nature of the Case

According to the complaint, defendants — Church of Scientology International, Church of Scientology Illinois, and Bowles & Moxon, a Los Angeles law firm — conspired with each other, with certain individual Scientology members, and with others to commence and prosecute a series of unfounded lawsuits against the Cult Awareness Network ("CAN"), a small, not-for-profit organization dedicated to educating the public as to religious rights, freedoms, and responsibilities, and its affiliates for the purpose of achieving a number of illicit ends unrelated to the merits of the defendants' purported claims. R. C213, R. C227-228. Specifically, by maintaining at least 21 baseless actions against CAN and its affiliates, defendants sought to impede CAN's efforts to provide public education regarding cult organizations, to drive CAN into bankruptcy, and to squelch CAN's anti-cult message. R. C213, C229, C230. As a result of these lawsuits, CAN's members, officers, and employees have been forced to devote an inordinate amount of their time and to expend an exorbitant percentage of CAN's limited resources defending against these meritless claims. *Ibid.*

To generate this flood of unfounded litigation, defendants suggested, instigated, encouraged, assisted, and financed lawsuits brought in the names of certain nominal "plaintiffs" — individual members of the Church of Scientology. R. C228. Defendants also provided office space and boilerplate pleadings to facilitate the filing of these vexatious lawsuits, most of which alleged the same factually and/or legally deficient civil rights claims, and all of which were resolved in CAN's favor. R. C228-229.

As evidenced in the findings of a California court in one of the underlying actions, these lawsuits appear to have their genesis in a February 1991 edict of the Church of Scientology "identif[ying] CAN as a suppressive group,

which Church literature defines as 'one that actively seeks to suppress or damage Scientology or a Scientologist by Suppressive Acts.'" *Hart v. Cult Awareness Network*, 16 Cal. Rptr. 2d 705, 707 (App. 1993). The *Hart* Court further noted that "[a]ccording to Church literature, a suppressive person or group becomes 'fair game,' and a person or group which is fair game 'May be deprived of property or injured by any means by any Scientologist without any discipline of the Scientologist. May be tricked, sued or lied to or destroyed.'" *Ibid.*

And, indeed, between 1992 and 1994 a relentless barrage of lawsuits, all of which are alleged to have been meritless, was brought against CAN at the behest of the defendants in the names of various individual Scientologists.[1/]

[1/] CAN has not been the sole target of the Scientology litigation factory. In 1996, for example, a California court found that "the history of the underlying litigation reveals that the instant action is consistent with a pattern of conduct by the Church to employ every means, regardless of merit, to frustrate or undermine Wollersheim's petition activity." *Church of Scientology of California v. Wollersheim*, 49 Cal. Rptr. 2d 620, 632 (App. 1996). As the *Wollersheim* Court noted, among other tactics employed during the fifteen years of litigation, Scientology asked the Ninth Circuit "to disqualify the entire United States District Court for the Central District of California. In an unprecedented ruling the Ninth Circuit struck the motion from its records." *Id.* at 624. The Court further described the Church as having "continuously and unsuccessfully use[d] the litigation process to bludgeon the opponent into submission." *Id.* at 632. And, in an even more recent case in which petitioner Church of Scientology International was a co-plaintiff, the Ninth Circuit affirmed an (continued...)

This is not, therefore, an instance of a single (even meritless) lawsuit begetting a retaliatory lawsuit. Rather, defendants have attempted to smother a small competitor in the marketplace of ideas under the weight of more than a score of frivolous lawsuits.

B. The Underlying Lawsuits

As alleged in the complaint, defendants have instigated the filing of at least 21 actions against CAN and its affiliates in state and federal courts in seven jurisdictions across the United States, including Illinois. R. C213-227. The vast majority of these lawsuits claimed that CAN had violated federal or state civil rights laws by refusing to permit individual members of the Church of Scientology to join CAN or attend CAN meetings, or refusing to recognize Scientology-established organizations as CAN affiliates. R. C214-217, C218-227. Two additional suits alleged

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(...continued)
award of almost $2.9 million in attorneys' fees against plaintiffs, quoting the special master's finding that plaintiffs' complaints had been brought "in bad faith to harass the individual defendants and destroy [a church comprising a splinter group of Scientology] through massive over-litigation and other highly questionable litigation tactics." *Religious Technology Center v. Scott*, 1996 WL 171443, at *5 (9th Cir. Apr. 11, 1996). See also J. P. Kumar, *"Fair Game": Leveling the Playing Field in Scientology Litigation*, 16 REV. LITIG. 747, 749-50 (1997) (noting that "the most obvious feature of the Church of Scientology's use of the legal system is the sheer volume of litigation initiated by the Church in both offensive and defensive situations," and that the "principal goals" of this tactic "are to delay the final resolution of the matter for as long as possible, thereby depleting the resources and stamina of an opponent").

intentional torts under state law. One suit claimed that CAN fraudulently induced a Scientologist into performing volunteer activities. R. C213-214. The other lawsuit purported to state a cause of action for intentional infliction of emotional distress and fraudulent misrepresentation for CAN's alleged refusal to permit a Scientologist to attend CAN's annual meeting. R. C217-218.

CAN was the prevailing party in all of these lawsuits. R. C213-227. The various courts granted CAN's motions for summary judgment in five cases, granted motions to dismiss in four more cases, dismissed ten other cases with prejudice, and permitted voluntary dismissals by the individual Scientologists in two cases. *Ibid.* Most of the civil rights claims were decided in favor of CAN on the obvious ground that CAN, a private organization and not a place of public accommodation, is not governed by the applicable civil rights laws. See, *e.g.*, R. C215-217, C218, C220, C226. Moreover, in securing a voluntary dismissal, the nominal plaintiff in one suit even admitted that "the lawsuit is without foundation in fact and was instigated by the Church of Scientology." R. C214. Two other suits similarly were utterly lacking in factual support; in both instances, Scientologists brought suit alleging that CAN had discriminated against them in denying them membership even though neither nominal plaintiff had even bothered to apply for such membership prior to instituting legal action. R. C214-215, C226.[2/]

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[2] In their statement of the case, petitioners have presented "facts" that are wholly at odds with the allegations of the complaint. For example, without citation to the record, petitioners state that CAN has targeted Scientology as a cult and that in an effort to bring balance and fairness to

(continued...)

C. The State Court Proceedings

1. Circuit Court of Cook County. In 1994, CAN filed the instant suit. R. C3. In its second amended complaint, which is the pleading at issue here, CAN alleged that defendants Church of Scientology International, Bowles & Moxon, and Church of Scientology Illinois had conspired to engage in malicious prosecution. R. C227-230. Before the parties conducted any discovery, the trial court dismissed CAN's complaint for failure to state a claim under then-existing Illinois law. Pet. App. 35a-42a.

2. Appellate Court of Illinois. The Appellate Court affirmed the dismissal of CAN's complaints. The court reasoned that CAN's allegations did not satisfy two elements required to state a claim for malicious prosecution under Illinois law: (1) the underlying litigation must have been favorably terminated in the malicious prosecution plaintiff's favor, and (2) the plaintiff must have suffered special damages in defending against the underlying suits. Pet. App. 19a-34a. In regard to the former, the court held that the voluntary and involuntary dismissals, dismissals for failure to state a cause of action, and summary judgments obtained by CAN did not satisfy the Illinois favorable termination standard, which required a judicial determination that "deals with the *factual* issue or issues of a case." *Id.* at 25a (emphasis in original). With respect to the latter, the

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[2](...continued)
CAN's educational efforts, a number of Scientology parishioners attempted to join CAN and then filed test cases challenging CAN's refusal to admit them as members. Pet. 3. None of this is in the complaint. In view of the procedural posture of the case, these assertions are not properly before this Court and must be disregarded.

court held that the damages alleged by CAN constituted the ordinary harm generated from any legal action. *Id.* at 29a.

3. Supreme Court of Illinois. The Illinois Supreme Court reversed and remanded the cause to the circuit court for further proceedings. Pet. App. 1a-18a. In analyzing the favorable termination requirement, the court found that the approach followed in recent decades by the Illinois appellate courts was "at odds with modern tort law," *id.* at 8a, and proceeded to adopt the approach of the Restatement (Second) of Torts § 674. *Id.* at 11a. Then, applying the Restatement approach to CAN's complaint, the court found that CAN had adequately alleged the favorable termination of the underlying actions. *Id.* at 12a.

The court also concluded that CAN had sufficiently pled special damages:

> "[T]he present case involves allegations that a large national corporation improperly induced its members to engage in a national campaign of simultaneous malicious prosecution. Plaintiff has alleged that the Church of Scientology instituted the simultaneous suits, not to resolve any legal dispute between the parties, but to keep plaintiff from engaging in its business of disseminating information regarding religious freedom. The invidiousness of the alleged conspiracy is best reflected in the fact that plaintiff was sued 21 times over the course of a 17-month period in jurisdictions ranging from New York to California. Such a sustained onslaught of litigation can hardly be deemed 'ordinary' if plaintiff can prove that the actions were brought without probable cause and with malice. In view of these circumstances, we believe that plaintiff has set forth facts, which if proved true, satisfy our special injury rule."

Pet. App. 16a-17a.

Finally, the court briefly touched upon defendants' First Amendment argument, noting that while the Constitution "affords protection to the *honest* litigator in search of resolutions to *true* legal disputes," it "does not provide the right to any individual to assist another, with money or otherwise, in the prosecution of a suit which has been filed with malice and without probable cause." Pet. App. 17a (emphasis in original). The court then held that because defendants "challenged plaintiff's complaint by way of a * * * motion to dismiss * * * defendants' constitutional argument, which is a fact-dependent defense to the action * * * *cannot be considered* in the context of the present motion to dismiss." *Id.* at 17a-18a (emphasis added). The court added, however, that "[n]othing in our opinion prevents defendants from raising the first amendment's protections at the appropriate juncture in this case." *Id.* at 18a.

In sum, although the court stressed that "[a]n action for malicious prosecution remains one that is disfavored in law," Pet. App. 18a, it concluded that CAN had sufficiently alleged the elements of the tort under Illinois law. *Ibid.* Accordingly, the court "reverse[d] the judgments of the appellate and circuit courts, and remand[ed] the matter to the circuit court for further proceedings consistent with this opinion." *Ibid.*

REASONS FOR DENYING THE PETITION

The question presented in the petition plainly does not warrant this Court's review for several reasons. The most obvious of these reasons is that the Court lacks jurisdiction. Under well-settled principles, addressed most recently in *Jefferson v. City of Tarrant*, 118 S. Ct. 481 (1997), the decision of the Supreme Court of Illinois is not reviewable by this Court because the Illinois high court did not render

a "[f]inal judgment[] or decree[]," as required to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a). All that the Supreme Court of Illinois did in the decision sought to be reviewed was to reverse the dismissal of a complaint and remand the case to the state trial court "for further proceedings consistent with this opinion." Pet. App. 18a. Its order thus was "avowedly interlocutory," *Jefferson*, 118 S. Ct. at 486, and cannot be reviewed by this Court at this time.

Moreover, because the state supreme court has not even considered — let alone "finally determined" — the federal issue raised by petitioners, none of the exceptions recognized by this Court to the "firm final judgment rule," *Jefferson*, 118 S. Ct. at 485-86, could possibly apply in this case. Nor would any of these exceptions apply had the Supreme Court of Illinois actually decided the federal issue. In short, given the procedural posture of the case, there is absolutely no basis for review in this Court of the question presented.

Even if this Court had jurisdiction, the petition should be denied as premature for prudential reasons. One of the most fundamental and deeply rooted canons of constitutional adjudication is the principle that this Court will not "decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This case presents a clear occasion for application of this self-imposed principle of judicial restraint. In its opinion, the Supreme Court of Illinois expressly stated that the federal constitutional question raised by petitioners "*cannot be considered* in the context of the present motion to dismiss." Pet. App. 18a (emphasis added). The court then expressly invited petitioners to raise their First Amendment defense on remand "at the appropriate juncture in this case," *ibid.*, at which time the issue presented in this petition will become moot if

petitioners prevail. It is difficult to conceive of circumstances in which a question presented to this Court in a petition for writ of certiorari would be more patently premature.

Finally, even apart from the insurmountable jurisdictional and prudential obstacles noted above, the Court should not hear this case because the factual premise upon which the petition is based is fictitious. Petitioners chose to attack the complaint in a motion to dismiss. Accordingly, the allegations set forth in the complaint must be accepted as true at this stage of the case. Those allegations charge petitioners with instigating and maintaining over 20 meritless civil suits, with malice and without probable cause, for the purpose of harassing and eliminating a competitor in the marketplace of ideas. This Court's decisions make clear that such activities, if proven to be true, are not entitled to protection under the First Amendment. The petition, however, essentially ignores the complaint's allegations, substituting instead the petitioners' view of the facts. That is impermissible. Petitioners will have an opportunity to contest CAN's allegations on remand, but for now the Court must accept as true the complaint's allegations that petitioners have engaged in a pattern of filing vexatious lawsuits against CAN. And it is clear under this Court's decisions that this sort of abuse of the judicial system is not protected by the Constitution.

I. THIS COURT LACKS JURISDICTION OVER THE NON-FINAL DECISION OF THE SUPREME COURT OF ILLINOIS.

A. 28 U.S.C. § 1257(a) Limits This Court's Jurisdiction To Review State Court Decisions To Final Judgments Of A State's Highest Court.

In *Jefferson v. City of Tarrant*, 118 S. Ct. 481 (1997), a decision issued one week before the instant petition was

filed, this Court reiterated the longstanding rule that it lacks jurisdiction over interlocutory rulings of state supreme courts. As the Court explained, "Congress has limited our review of state-court decisions to '[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had.'" *Id.* at 484 (quoting 28 U.S.C. § 1257(a)). This provision, the Court continued, "establishes a firm final judgment rule" that "'is not one of those technicalities to be easily scorned.'" *Id.* at 485, 486 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). Rather, "'[i]t is an important factor in the smooth working of our federal system,'" *id.* at 486, that serves several ends:

> "(1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; [and] (3) it limits review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs."

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973).

Under section 1257(a), a state court decision is not reviewable by this Court unless it is final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street R. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945). In short, "[i]t must be the final word of a final court." *Ibid.* This Court has consistently recognized, with rare exceptions described below, that "the overruling of a demurrer, like the issuance of a temporary injunction, is not a 'final' judgment." *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 382 (1953); see

also *Missouri & K. I. R. Co. v. Olathe*, 222 U.S. 185 (1911); *Clark v. Kansas City*, 172 U.S. 334 (1899); *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U.S. 608, 610-11 (1892); *McComb v. Commissioners*, 91 U.S. 1 (1875). As the leading Supreme Court treatise has summarized,

> "In civil litigation, the judgment of the highest state court relating to a demurrer or motion to dismiss a complaint is final only if the case is thereby disposed of conclusively. Thus, *where a dismissal of the suit has not been ordered*, or where leave to amend or answer over has been granted, finality has been found lacking."

Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 106 (7th ed. 1993) (emphasis added).

Here, as in *Jefferson*, the decision of the state supreme court reversing the trial court's dismissal of CAN's complaint "was not a 'final judgment,'" but was instead "avowedly interlocutory." 118 S. Ct. at 486. The Supreme Court of Illinois, in words almost identical to those used by its Alabama counterpart in *Jefferson*, "remand[ed] the matter to the circuit court for further proceedings consistent with this opinion." Pet. App. 18a. Compare *City of Tarrant v. Jefferson*, 682 So. 2d 29, 31 (Ala. 1996) (remanding "for further proceedings consistent with this opinion"). Thus, as in *Jefferson*, "[a]bsent settlement or further dispositive motions, the proceedings on remand will include a trial on the merits of the state-law claims." 118 S. Ct. at 486; see also *O'Dell v. Espinoza*, 456 U.S. 430, 430 (1982) (per curiam) ("Because the Colorado Supreme Court remanded this case for trial, its decision is not final 'as an effective determination of the litigation'"); cf. *Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982) (observing that decision of Mississippi Supreme Court "plainly did not appear final at the time it

was rendered" where Court remanded case "for further proceedings not inconsistent with [its] opinion"). In these circumstances, this Court lacks jurisdiction over the decision of which petitioners seek review, and the petition should be denied.

B. Any Effort To Invoke An Exception To The Finality Requirement Would Be Futile Because The Supreme Court Of Illinois Did Not Finally Determine The Federal Issue Presented In The Petition.

While the "firm final judgment rule" is "not * * * to be easily scorned," *Jefferson*, 118 S. Ct. at 485-86, this Court recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), "four categories of * * * cases in which the Court has treated the [state court] decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Id.* at 477.[3] Significantly, however, these four categories of cases all involve "situations in which the highest court of a State has *finally determined the federal issue present in a particular case*." *Ibid.* (emphasis added); see also *Flynt v. Ohio*, 451 U.S. 619, 621 (1981) (noting that "in most, if not all, of the cases falling within the four exceptions, not only was there a final judgment on the federal issue for purposes of state-court proceedings, but also there were no other federal issues to be resolved").

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[3] In post-*Cox* cases, this Court has suggested that these exceptions, particularly the fourth exception, should be narrowly construed, so as not to "swallow the rule" requiring a final judgment. See *Flynt v. Ohio*, 451 U.S. 619, 622 (1981); see also Stern et al., *supra*, at 104.

Here, petitioners cannot even demonstrate that the Supreme Court of Illinois has "finally determined the federal issue presented" in this case, let alone satisfy the criteria for invoking any of the specific *Cox* exceptions. Indeed, the Supreme Court of Illinois has not even decided the federal issue *once* — it specifically declined, at this stage of the litigation, to rule on the merits of the federal question that petitioners have asked this Court to review. The Illinois high court did acknowledge the decisions of this Court upon which defendants relied (and cite here, too), but "dispute[d] the defendants' reliance upon them" given the allegations here. Pet. App. 17a. As the court observed, while the Constitution "affords protection to the *honest* litigator in search of resolutions to *true* legal disputes," it "does not provide the right to any individual to assist another, with money or otherwise, in the prosecution of a suit which has been filed with malice and without probable cause." *Ibid.* But given the procedural posture of this case, the court did not decide the issue. To the contrary, because defendants "challenged plaintiff's complaint by way of a * * * motion to dismiss," the court expressly held that defendants' "constitutional argument, which is a fact-dependent defense to the action * * * *cannot be considered* in the context of the present motion to dismiss." *Id.* at 17a-18a (emphasis added). Then, to underscore the fact that further proceedings in the state trial court "could effectively moot the federal-law question," *Jefferson*, 118 S. Ct. at 486, the court added that "[n]othing in our opinion prevents defendants from raising the first amendment's protections at the appropriate juncture in this case." Pet. App. 18a. In sum, then, because the federal issue raised by petitioners has not been decided at all by the Illinois Supreme Court — let alone "finally decided" — petitioners cannot invoke any of the *Cox* exceptions to the finality rule for state court judgments.

C. Even If The Supreme Court Of Illinois Had Finally Decided The Federal Issue, None Of The *Cox* Exceptions To The Finality Rule Would Apply.

Moreover, even if the Supreme Court of Illinois had finally decided the First Amendment issue raised by defendants, none of the *Cox* exceptions would apply in any event.

The first category includes "cases in which * * * the federal issue is conclusive or the outcome of further proceedings preordained." *Cox*, 420 U.S. at 479. As an example of this type of case, the *Cox* Court cited *Mills v. Alabama*, 384 U.S. 214, 217-18 (1966), in which the finality rule was overlooked because "the appellant had no defense other than his federal claim and could not prevail at trial on the facts or any nonfederal ground." *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379 (1953), also falls within this category. There, the Court took jurisdiction over a state court judgment that "ordinarily" would not have been considered final because the petitioner was "both explicit and free with his concession that his case rests upon his federal claim and nothing more." *Id.* at 382. As much as we wish this were the case here, we have received no indication that petitioners have conceded that CAN's case on the merits of the state law claims is so strong that the outcome on remand is "preordained" or that their defense rests solely on the First Amendment. Nor did the Supreme Court of Illinois suggest that the proceedings on remand are a mere formality; the court simply held that CAN has adequately *alleged* a claim for malicious prosecution, Pet. App. 18a, a very different thing from prevailing at trial on that claim.

The second category encompasses cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the

outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. In such cases, "[n]othing * * * short of settlement of the case, would foreclose or make unnecessary decision on the federal question." *Ibid.* Application of this exception also is plainly foreclosed by the Illinois high court's statement that "[n]othing in our opinion prevents defendants from raising the first amendment's protections at the appropriate juncture in this case." Pet. App. 18a. In other words, the federal question raised in the petition might become moot if defendants prevail on remand either on state law grounds or on their First Amendment defense.

The third category involves "situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, 420 U.S. at 481. The paradigmatic example is *California* v. *Stewart*, 384 U.S. 436, 498 n.71 (1966), in which this Court "explain[ed] that the state judgment was 'final' since an acquittal of the defendant at trial would preclude, under state law, an appeal by the State." *Cox*, 420 U.S. at 481. This exception also does not apply here. The First Amendment issue remains open for consideration by the Illinois courts on remand from the Supreme Court of Illinois, and if it is not mooted in the course of those proceedings, it will be ripe for consideration by this Court after a final decision has been rendered.

Finally, the fourth *Cox* exception also would not apply either. This exception may be invoked where "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" and "refusal immediately to review the state-court decision might seriously erode federal policy." *Cox*, 420 U.S. at 482-83. This Court, in fact, relied on this exception in finding jurisdiction over a decision of the Georgia Supreme Court in *Cox* itself. In doing so, the Court observed that the state

court decision was "plainly final on the federal issue" and "even if appellants prevailed at trial and made unnecessary further consideration of the constitutional question, *there would remain in effect the unreviewed decision* of the State Supreme Court" upholding "a statute the constitutionality of which is in serious doubt." *Id.* at 485-86 (emphasis added).

There are no such concerns here. In its opinion reinstating CAN's complaint, the Supreme Court of Illinois simply did not render a decision of any kind on the merits of petitioners' First Amendment defense. The absence of a ruling from the Illinois high court on this issue means that there is no precedent at all in need of review (and correction).

Moreover, it is by no means clear that a decision on remand in petitioners' favor on the First Amendment question "would be preclusive of any further litigation" on CAN's cause of action. Illinois has no obligation to require special damages as an element of a malicious prosecution claim. If the Illinois courts were to decide that the special damage requirement infringed upon activity protected by the First Amendment, they would be free to redefine that element, or to eliminate it altogether as a majority of states have done. See Reporter's Note to Appendix, Restatement (Second) of Torts § 674, at 438 (1981) (noting that the "clear and growing majority" of thirty states follow the "American" rule which does not require special damages).

II. THE DOCTRINE OF AVOIDING UNNECESSARY OR PREMATURE ADJUDICATION OF CONSTITUTIONAL QUESTIONS ALSO SUPPORTS DENIAL OF THE PETITION.

Even if the statutory limitations on this Court's jurisdiction did not impose an absolute bar on review of this case, the petition should be denied pursuant to the closely related prudential doctrine that the Court will not "decide

questions of a constitutional nature unless absolutely necessary to a decision of the case." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This doctrine has been described as a "fundamental and long-standing principle of judicial restraint," *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988), that is "more deeply rooted than any other in the process of constitutional adjudication." *New York City Transit Authority v. Beazer*, 440 U.S. 568, 582 (1979). Although the doctrine has been developed by this Court "for its own governance in * * * cases confessedly within its jurisdiction," *Ashwander*, 297 U.S. at 346 (Brandeis, J., concurring), it bears a "close connection" to the constitutional and statutory "limitations on [the Court's] jurisdiction." *Minnick v. California Dept. of Corrections*, 452 U.S. 105, 122 n.30 (1981). See also *Rescue Army v. Municipal Court*, 331 U.S. 549, 571 (1947) (explaining that "some if not all" of the "ultimate foundations" for the policy of avoiding the premature adjudication of constitutional issues "also sustain the jurisdictional limitation[s]" on the Court).

In view of the important policies at stake when the jurisdictional and prudential restraints on the Court converge, a petitioner bears a higher "burden of affirmatively establishing this Court's jurisdiction" when seeking review of a federal *constitutional* issue arising out of state court litigation. See *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 67-71 (1948). As the Court has explained, the "prerequisite for the exercise of the appellate powers of this Court" of a final judgment of the highest state court "is especially pertinent when a constitutional barrier is asserted against a State court's decision on matters peculiarly of local concern." *Id.* at 67. In such circumstances, "[t]he policy against premature constitutional adjudications demands that any doubts * * * be resolved against jurisdiction." *Id.* at 71.

These principles are fully applicable here, and they provide another compelling reason for denying the petition. Petitioners raise a First Amendment issue in the context of a suit for malicious prosecution governed by Illinois law. As explained above, the Illinois courts have not rendered a final decision on either the federal or state law aspects of the action. To the contrary, petitioners have been expressly invited by the Supreme Court of Illinois to press their federal claim "at the appropriate juncture" on remand. Pet. App. 18a. And if they are successful in doing so, or if they prevail on state law grounds, the question presented in the instant petition will become moot. Where finality is so clearly lacking (in any sense of the word), consideration of a First Amendment question is entirely unwarranted.

III. THE FIRST AMENDMENT DOES NOT PROTECT THE ACTIVITIES ALLEGEDLY UNDERTAKEN BY THE DEFENDANTS IN ANY EVENT.

As demonstrated above, the jurisdictional and prudential obstacles to review of the question presented in this petition are insurmountable. But even if they were not, this would not be an appropriate case for review because petitioners' entire First Amendment claim rests upon a misapprehension of both the allegations of CAN's complaint and the scope of the constitutional right to access to the courts. Once these erroneous premises are recognized and the issues correctly framed, this Court's decisions establish beyond any doubt that the First Amendment does not protect the blatant misuse of the litigation process alleged to have taken place here.

Petitioners contend that the decision of the Supreme Court of Illinois "directly conflicts with decisions of th[is] Court and abridges the First Amendment rights of petitioners" (Pet. 1) by "expand[ing] the definition of special damages to include instances where a defendant has encouraged and coordinated a series of lawsuits to be brought

to challenge discriminatory practices." *Id.* at 13.[4/] Cloaking themselves in the mantel of the NAACP civil rights activists, petitioners claim that the court has infringed upon their right to "obtain meaningful access to the courts" through "group legal action," as recognized in "the *Button* line of cases." *Id.* at 13-15.

Like the Supreme Court of Illinois, CAN "do[es] not dispute the correctness of these Supreme Court decisions," but only with "the defendants' reliance upon them." Pet. App. 17a. It is beyond dispute that "[t]he right of access to the courts is * * * one aspect of the right of petition" under the First Amendment. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). But, as explained below, this right is not absolute; it does not extend, for example, to the institution of "a pattern of baseless, repetitive claims," *id.* at 513, or to "suits based on insubstantial claims * * * that lack * * * a 'reasonable basis.'" *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983); see also *Wright v. DeArmond*, 977 F.2d 339, 347 (7th Cir. 1992) ("While normally protected by the

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[4] Contrary to petitioners' contention, the Supreme Court of Illinois did *not* expand its conception of special damages. In fact, the Court explicitly "stress[ed] that [its] holding with respect to the special injury requirement *should not be viewed as a rejection of the rule as set forth in [its] earlier opinions*." Pet. App. 18a. As the Court explained, its holding followed from the "common theme with respect to the special injury rule which runs throughout all of this court's opinions on the subject" that the courts have a "responsibility to maintain a proper balance between the societal interest in preventing harassing suits and in permitting the honest assertion of rights in our courtrooms." *Id.* at 16a.

first amendment, the invocation of administrative or judicial proceedings may be tortious and actionable if employed for a purpose that is unlawful and is other than and in addition to the goal sought openly in the proceeding itself"); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982) (Posner, J.) (noting that the "line" between proper and improper litigation purposes "is crossed when [plaintiff's] purpose is not to win a favorable judgment * * * but to harass [defendant], and deter others, by the process itself — regardless of outcome — of litigating").[5/]

Whether petitioners truly were pursuing legitimate test cases (as they insist), or whether the suits were instigated by the petitioners maliciously and without probable cause to drain CAN's resources and eliminate a competitor in the marketplace of ideas (as the pleadings allege), cannot be determined at this stage of the case. The Supreme Court of Illinois, in fact, recognized this, holding simply "that plaintiff has set forth facts, *which if proved true*, satisfy our special injury rule." Pet. 17a (emphasis added) (explaining that it could only consider "the allegations contained within the four corners of plaintiff's complaint"). For now, the procedural posture of the case dictates that CAN's allegations be taken as true.

Petitioners endeavor to resist the reality that this case is currently governed by the allegations of CAN's complaint by ignoring it. As such, petitioners' question presented simply presumes that the Supreme Court of Illinois swept conduct protected by the First Amendment within the ambit of malicious prosecution. Petitioners then try to bolster this

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[5] Petitioners' own case, *In re Primus*, 436 U.S. 412 (1978), at least implicitly acknowledges these limits, emphasizing the interests of "suitable litigants," *id.* at 431, pursuing "lawful means of vindicating legal rights," *id.* at 432.

sweeping assumption by presenting "facts" in their statement of the case that are wholly at odds with the allegations of the complaint. Most egregiously, petitioners, without citation to the record, assert that CAN has targeted Scientology as a cult and that in an effort to bring balance and fairness to CAN's educational efforts, a number of Scientology parishioners attempted to join CAN and then filed test cases challenging CAN's refusal to admit them as members. Pet. 3. This transparent and self-serving attempt to contradict the allegations of the complaint must be disregarded. *Bryson v. News America Publications, Inc.*, 177 Ill. 2d 77, 91, 672 N.E.2d 1207, 1216 (1996) (under Illinois law, in ruling on a motion to dismiss, the court "may consider only the allegations of the complaint * * * and may not consider other supporting material"). And once petitioners' effort to recast the factual allegations of the complaint in their favor is rejected, the assertion that the Supreme Court of Illinois defined its special damage rule to include First Amendment protected conduct rests on nothing more than petitioners' own *ipse dixit*. This cannot overcome the allegations of the complaint, which charge petitioners with filing vexatious lawsuits, not legitimate "test cases."

The First Amendment right of access to the courts is limited to litigants prosecuting meritorious actions. "[S]uits based on insubstantial claims * * * that lack * * * a 'reasonable basis' * * * *are not within the scope of First Amendment protection.*" *Bill Johnson's Restaurants*, 461 U.S. at 743 (emphasis added). As this Court explained,

> "The first amendment interests involved in private litigation — compensation for violated rights and interests, the psychological benefits of vindication, public airing of disputed facts — are not advanced when the litigation is based on intentional falsehoods or on knowingly frivolous claims. Furthermore, since sham litigation by definition

> does not involve a bona fide grievance, it does not come within the first amendment right to petition."

Ibid.

Other cases also have established the critical distinction between legitimate claims entitled to First Amendment protection and "sham" litigation that is not. *California Motor Transport* is particularly instructive in this regard. Like the instant case, that case involved allegations of "concerted action by petitioners to institute state and federal proceedings," 404 U.S. at 509, "with or without probable cause, and regardless of the merits of the cases," *id.* at 512, for the purpose of "putting their competitors, including plaintiff, out of business," *id.* at 511. These allegations, the Court found, fell in the category of unprotected litigation activity. As the Court explained, "a pattern of baseless, repetitive claims * * * [that] leads the factfinder to conclude that the administrative and judicial processes have been abused * * * cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'" *Id.* at 513.

Since *California Motor Transport*, this Court has reaffirmed that "repetitive lawsuits carrying the hallmark of insubstantial claims," *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973), and "private action that is not genuinely aimed at procuring favorable government action," *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4 (1988), constitute unprotected "sham" litigation. And more recently, in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), this Court cited *California Motor Transport* with approval, explaining that the complaint in *California Motor Transport* "showed a sham not entitled to immunity," *id.* at 57, on the basis of its allegations concerning "the institution of legal proceedings 'without probable cause.'" *Id.* at 58.

Petitioners contend that *Professional Real Estate Investors* generally governs the scope of "First Amendment protections afforded a malicious prosecution defendant," Pet. 14, but that case is factually inapposite given the allegations of the complaint. *Professional Real Estate Investors*, as Judge Kozinski has explained, "provides a strict two-step analysis to assess whether a *single action* constitutes sham petitioning," which involves a "retrospective" inquiry into whether the suit had "objective merit." *USS-Posco Indus. v. Contra Costa County Building & Constr. Trades Council*, 31 F.3d 800, 810-11 (9th Cir. 1994) (emphasis added). *California Motor Transport*, by contrast, "deals with the case where the defendant is accused of bringing *a whole series of legal proceedings*," and requires a "prospective" inquiry into whether the "legal filings [were] made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment." *Id.* at 811 (emphasis added). Here, as in *USS-Posco Industries*, the allegations "track the language of *California Motor Transport*." *Ibid.* Indeed, this case presents a far stronger case on the merits than *USS-Posco Industries* because CAN's complaint alleges that all 21 of the underlying suits terminated in its favor, Pet. App. 11a-12a, whereas the underlying *plaintiffs* prevailed in 15 of the 29 suits in *USS-Posco Industries*. 31 F.3d at 811.

In sum, *California Motor Transport* plainly governs this case and renders petitioners' First Amendment defense wholly ineffectual at this stage of the proceedings. Under that case and the other decisions of this Court cited above, the First Amendment will not save petitioners from liability if CAN's allegations — that petitioners have instituted a series of legal proceedings, with malice and without probable cause, for the purpose of harassing and eliminating a competitor in the marketplace of ideas — are proven true. If, on the other hand, CAN fails to prove its allegations, the

First Amendment question raised in the instant petition will be moot. Accordingly, even if the jurisdictional and precedential barriers to a grant of certiorari were not present, there would be no reason for the Court to hear this case.

CONCLUSION

The petition for certiorari should be denied.

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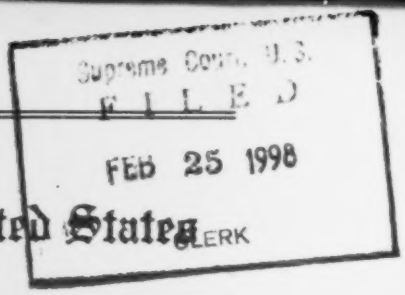

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CHURCH OF SCIENTOLOGY INTERNATIONAL; BOWLES & MOXON; AND CHURCH OF SCIENTOLOGY OF ILLINOIS,

Petitioners,

v.

CULT AWARENESS NETWORK,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The brief of respondent Cult Awareness Network ("CAN") in opposition to the petition for writ of certiorari avoids the important constitutional issue the petition raises, and instead, makes much of the procedural posture of the case, arguing that because the question presented arises in the context of a motion to dismiss, the Court is required to deny the petition. CAN, however, misrepresents the true nature and significance of the procedural posture of the case, which, in fact, provides a firm basis for the Court's jurisdiction and review of the question presented. The instant petition seeks review of the only federal issue in this case, a clearly and starkly presented question of constitutional law that was specifically addressed and finally determined by the highest state court in Illinois, and which if reversed would be preclusive of any further litigation in this action. Based on this procedural posture, the Court without doubt has jurisdiction to review the critical and potentially decisive First Amendment issue raised here – whether Illinois may define its special injury requirement for the tort of malicious prosecution to include the coordination and encouragement of a series of lawsuits challenging discriminatory practices when relevant decisions of the Court have held that such activities are protected under the First Amendment to the Constitution of the United States. Indeed, it is ironic that in a case where CAN alleges it has been the victim of vexatious litigation, it is asking the Court to defer ruling on an issue that could resolve the case on legal grounds, and require instead that the parties first proceed to trial and litigate a claim that will necessitate voluminous discovery and consume numerous energy, time, and judicial resources, which may all be for naught.

1. Respondent's argument that the Court lacks jurisdiction to review the First Amendment issue raised here mischaracterizes both the decision of Supreme Court of Illinois and the final judgment rule.

a. Contrary to respondent's contention, the Supreme Court of Illinois directly, decisively, and finally determined the First Amendment issue petitioners raise. As set forth in detail in the Petition, petitioners moved to dismiss respondent's complaint for failure to state a claim for conspiracy to engage in malicious prosecution, arguing, among other grounds, that the complaint failed to allege sufficient facts to satisfy Illinois' special damages requirement under existing Illinois law. (Pet. 5-9.)[1/] Petitioners further argued that even if the allegations of the complaint were true and they coordinated the cases underlying CAN's conspiracy claim and provided counsel and assistance to challenge a pattern and practice of discrimination, such actions were protected First Amendment activities under the Court's *Button* line of cases,[2/] and thus could not constitute special damages under Illinois malicious prosecution law. (*Id.*) The Supreme Court of Illinois, however, specifically rejected petitioners' First Amendment argument and expanded Illinois' definition of special damages. As a matter of law, the court held that Illinois' special injury requirement for malicious prosecution cases could be met where a defendant has coordinated and encouraged a series of lawsuits challenging discriminatory practices. (16a-18a.) Thus, although the court

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1/ References to "(Pet. __)" are to the pages of the Petition. References to "(__a)" are to the pages of the appendix to the Petition. References to "(Opp. __)" are to the pages of Respondent's Brief in Opposition. References to "(R. __)" are to the pages of the clerk's record on appeal to the appellate court of Illinois.

2/ *NAACP* v. *Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers* v. *Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *United Transp. Union* v. *State Bar of Michigan*, 401 U.S. 576 (1971); *In re Primus*, 436 U.S. 412 (1978).

stated that petitioners could raise a First Amendment defense on remand,[3/] it conclusively determined that the coordination and encouragement of litigation to challenge discriminatory practices, activity protected under the First Amendment, could distinguish tortious from non-tortious conduct under Illinois malicious prosecution law. The Supreme Court of Illinois thus manifestly addressed and finally decided the federal constitutional issue raised here.

b. Respondent mistakenly contends that the Court lacks jurisdiction under 28 U.S.C. § 1257(a) to review petitioners' First Amendment claim because in reversing the dismissal of the complaint, the Supreme Court of Illinois remanded the case for further proceedings and thus its judgment cannot be considered final. (Opp. 10-13.) That further proceedings may be contemplated at the trial court level, however, does not foreclose the Court's jurisdiction under 28 U.S.C. § 1257.

Although the requirement of finality "is not one of those technicalities to be easily scorned," *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945), the Court has taken a much more flexible and "'pragmatic approach,'" *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 180 (1988) (quoting *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 486 (1975)), to the

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[3/] The First Amendment issue reserved for remand, under the analysis of the Supreme Court of Illinois, would turn upon whether or not the underlying lawsuits were brought with malice and without probable cause. *Cf. Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993). The First Amendment defense raised in this petition, however, was not reserved for remand, but was definitively rejected by the Supreme Court of Illinois: whether Illinois may distinguish between tortious and non-tortious litigation solely on the basis of coordination and encouragement of a series of lawsuits brought under civil rights antidiscrimination laws.

question of finality than CAN would have one believe. Recognizing that the concept of finality has acquired "a penumbral area," *Radio Station WOW*, 326 U.S. at 124, in which appealability is not necessarily limited to "the last order possible to be made in a case," *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152 (1964), "in practice the final judgment rule has not been interpreted so strictly." *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 306 (1989). Rather, the Court has long given the finality requirement a "'practical rather than a technical construction,'" *Construction Laborers* v. *Curry*, 371 U.S. 542, 549 (1963) (quoting *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949)), and has consistently ascribed finality to and reviewed state court judgments under § 1257 even where further proceedings are contemplated. *See Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477-85 (1975) (collecting and summarizing cases); *see also ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 611-12 (1989); *Duquesne Light Co.*, 488 U.S. at 306-07; *Goodyear Atomic Corp.*, 486 U.S. at 178-80.

This is particularly true where, as here, "these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice.'" *Cox*, 420 U.S. at 477-78 (quoting *Radio Station WOW*, 326 U.S. at 124). As CAN itself acknowledges, the petition presents "the only federal issue in the case." (Opp. i). Thus, there is no danger of piecemeal review and the Court's assertion of jurisdiction would not "offend the decisive objection to fragmentary reviews." *Radio Station WOW*, 326 U.S. at 127.

Furthermore, here, as in *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963), review and determination of the First Amendment issue at this stage of the litigation would "serve[] the policy underlying the requirement of finality in 28 U.S.C. § 1257." Rather than subjecting the parties "to long and complex litigation which may all be for naught," *id.*, if consideration of the constitutional question were postponed,

resolution of the issue now could be preclusive of any further litigation.[4/] It was only as a result of the state supreme court's expansion of its definition of special damages to include the coordination and encouragement of a series of lawsuits challenging discriminatory practices that CAN's complaint was found to have alleged sufficiently the special damages necessary to state a claim of conspiracy to engage in malicious prosecution, the sole cause of action brought against petitioners. Consequently, if the state supreme court's decision were to be reversed, CAN's complaint would be required to be dismissed, as the trial and appellate courts concluded (Pet. 38a-40a; R. 18-19, 27-28; Pet. 28a-30a), and this prolonged litigation could be brought to an end. To postpone consideration, in contrast, would result in a remand for trial of CAN's claim, which, given the breadth of CAN's allegations, would require extensive and voluminous discovery and consume numerous time, energy, and resources, all of which might be for naught.

Indeed, for this reason, this case falls squarely within the fourth category of cases identified in *Cox* in which the Court has treated a judgment as final and taken jurisdiction without awaiting the completion of additional proceedings in the lower state courts:

> [W]here the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of

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4/ *See also Mills* v. *Alabama*, 384 U.S. 214, 217-18 (1966) (finding that to postpone consideration of constitutional question would result in "roundabout process" that "would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets").

> the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Cox, 420 U.S. at 482-83 (citing *Construction Laborers*, 371 U.S. 542; *Mercantile Nat'l Bank*, 371 U.S. 555; *Hudson Distribs.* v. *Eli Lilly & Co.*, 377 U.S. 386 (1964); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241(1974)).

Here, as discussed *ante*, the judgment of the Supreme Court of Illinois was "plainly final on the federal issue." *Cox*, 420 U.S. at 485. Moreover, although petitioners could prevail at trial on nonfederal grounds, reversal of the state supreme court's holding would be preclusive of further litigation.[5/] CAN's complaint would be required to be dismissed for failure to meet Illinois' special damages requirement. Finally, refusal to grant review to petitioners' claim would leave in effect the unreviewed decision of the state supreme court, which petitioners contend

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[5/] CAN argues that "it is by no means clear that *a decision on remand* in petitioners' favor on the First Amendment question 'would be preclusive of any further litigation' on CAN's cause of action" because Illinois could eliminate or redefine the special injury requirement. (Opp. 17) (emphasis added.) The question, however, as set forth in *Cox*, is not whether a decision *on remand* would be preclusive of further litigation, but whether the Court's reversal of the state court on the federal issue at this stage would be preclusive of further litigation, which is clearly the case here.

abridges and erodes their First Amendment rights. "Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule." *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 55 (1989) (citing *National Socialist Party of America* v. *Skokie*, 432 U.S. 43, 44 (1977); *Miami Herald Publishing Co.*, 418 U.S. at 246-47)). Given that a decision on the merits of the only federal issue could terminate the litigation and an important First Amendment issue is at stake, the decision of the Supreme Court of Illinois on the federal issue should be considered a final judgment under 28 U.S.C. § 1257. *See, e.g., Fort Wayne Books*, 489 U.S. at 55-56 (holding that Court had jurisdiction to review First Amendment challenge to RICO statute even though further proceedings at state court level contemplated); *Goodyear Atomic Corp.*, 486 U.S. at 178-80 (concluding that case fell within fourth *Cox* exception where federal question concerning nuclear regulation finally determined by state supreme court and reversal would preclude further proceedings); *Cox*, 420 U.S. at 485-87 (finding jurisdiction over decision of state supreme court where First Amendment challenge to state statute and reversal on federal issue would terminate litigation).

c. Finally, respondent's reliance on *Jefferson* v. *City of Tarrant*, ___ U.S. ___, 118 S. Ct. 481 (1997), to support its contention that the Court lacks jurisdiction (Opp. 10-13), is misplaced. First, simply because the Supreme Court of Illinois remanded the case to the trial court for further proceedings does not divest the Court of jurisdiction. Rather, as demonstrated above, under circumstances such as presented here, the Court has consistently found finality and reviewed cases despite the ordering of further proceedings. Second, the facts in *Jefferson* underlying the Court's decision to decline jurisdiction are clearly distinguishable from those here. There, in a wrongful death action, plaintiff brought two state law claims and two federal claims under 42 U.S.C. § 1983. On an interlocutory appeal, the Alabama Supreme Court "answered a single certified question

that affected only two of the four counts in petitioners' complaint." *Id.* at 486. The state court concluded that the state wrongful death act governed plaintiffs' recovery on their § 1983 claims and remanded the case for further proceedings, including "a trial on the merits of the state-law claims." *Id.* Thus, in *Jefferson*, unlike here, reversal of the state supreme court's decision would not have terminated the litigation. Resolution of the federal issue was not determinative of petitioners' state law claims, which remained to be tried regardless of the outcome on the federal issue.

2. Not only is there no jurisdictional bar to review of the constitutional question presented, there is no bar on prudential grounds. The principles and considerations that underlie the Court's policy of judicial restraint in deciding constitutional questions are entirely absent in this case. *See Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 346-348 (1936) (Brandeis, J. concurring); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-575 (1947). This is not a case involving judicial review of a legislative act and thus there is no question of invading the province of coordinate branches of the government. Nor is it a case where the judgment can be sustained on an independent state ground. This is also not a case where there is a question regarding standing. Nor is it a case where a matter of state law remains unresolved or is ambiguous, or where further proceedings in state court would clarify the constitutional issue presented. Rather, the Supreme Court of Illinois definitively addressed and decided the constitutional issue petitioners raise here, which is "presented with clarity, precision and certainty." *Rescue Army*, 331 U.S. at 576. These circumstances are thus clearly distinguishable from those in *Rescue Army* and *Minnick* v. *California Dep't of Corrections*, 452 U.S. 105 (1981), upon which CAN relies. *Cf. Minnick*, 452 U.S. at 127 (declining jurisdiction where further state proceedings were likely to affect the constitutional issues because of "significant developments in the law – and perhaps in the facts as well" and where there were "significant ambiguities in the record"); *Rescue Army*, 331 U.S.

at 575-84 (refusing to exercise jurisdiction where constitutional issues were presented in "highly abstract form," the state court's construction of the code provision in question was "ambiguous," and where Court believed that further proceedings would ultimately tender "the underlying constitutional issues in clean-cut and concrete form").

Additionally, although the First Amendment issue petitioners raise arises in the context of a state malicious prosecution suit, it is not, as CAN asserts, simply a matter "'peculiarly of local concern,'" (Opp. 18, quoting *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 67 (1948)), any more than *Button* itself was a matter of local concern. *Republic Natural Gas* affected the regulation of gas production in a single state; this case concerns the rights of access to the courts and association for litigation purposes that are national in scope. Respondent's rule would effectively cut off Court review of virtually all state court litigation.

3. Finally, CAN's discussion of the merits of petitioners' First Amendment argument fails to address the constitutional question petitioners raise. CAN ignores two critical issues: 1) that in Illinois to maintain an action for malicious prosecution it is not enough to allege that the underlying action was brought without probable cause and with malice; a plaintiff must also allege special damages or special injury; and 2) that the Supreme Court of Illinois determined as a matter of law that a plaintiff could meet Illinois' special damages requirement where a defendant has coordinated and encouraged a series of lawsuits challenging discriminatory practices. Instead, in an attempt to turn the issue presented into a factual question, CAN focuses entirely on questions of probable cause and malice and contends that a trial is necessary to determine these issues. But the question petitioners raise is a strictly legal one. The issue is not whether petitioners brought the underlying cases with or without probable cause or with or without malice; it is whether Illinois can define its special damages requirement to include the encouragement and coordination of litigation to challenge

discriminatory practices and thus make the fact of having engaged in protected First Amendment activity the dividing line between tortious and non-tortious conduct. Because this question is a purely legal, not factual, one, it can certainly be determined at this stage in the litigation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Illinois should be granted.

Dated: New York, New York
February 24, 1998

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